BOSTON UNIVERSITY

GRADUATE SCHOOL

Thesis

THE FEDERAL LABOR INJUNCTION

by

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Approved

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"Dull-witted people think that whatever is expressed in legal formulas of a fixed character is just law."

--Scienza Nuova
Giambattista Vico

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CHAPTER I

INTRODUCTION

The labor injunction played a prominent role in labor disputes during the first three decades of the Twentieth Century. When the Norris-LaGuardia Act of 1932 restricted the use of the injunction to those labor disputes where fraud and violence were present, the importance of the labor injunction diminished. Employers resorted to the labor injunction less and less as the United States Supreme Court in a series of landmark decisions limited the area of injunctive action. With the Norris-LaGuardia Act the Government came closer to the position of neutrality in the economic conflict between capital and labor than at any time previous or since. The Act was, as Gregory calls it, a "self-help"[1] measure. Within the succeeding years, however, the role of the Government has become less neutral as Congress passed such pro-labor legislation as the Wagner Act and the Fair Labor Standards Act. Reform that was long overdue was bound to produce such a reaction. Labor's favored position during the thirties, however, led to the abuse of power and privilege in some cases. It soon became evident that the Wagner Act needed revising. This reform finally found expression in the Taft-Hartley Act of 1947. Certain provisions of the Act deal with the labor injunction, and the question arises as to whether the labor injunction will once again assume an important role in the American labor scene.

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INTRODUCTION

The labor injunction played a prominent role in labor disputes during the first three decades of the Twentieth Century. When the Norris-LaGuardia Act of 1932 restricted the use of the injunction to those labor disputes where fraud and violence were present, the importance of the labor injunction diminished. Employers resorted to the labor injunction less and less as the United States Supreme Court in a series of landmark decisions limited the area of injunctive action. With the Norris-LaGuardia Act the Government came closer to the position of neutrality in the economic conflict between capital and labor than at any time previous or since. The act was, as Gregory calls it, a "self-help"[1] measure. Within the succeeding years, however, the role of the Government has become less neutral as Congress passed such pro-labor legislation as the Wagner Act and the Fair Labor Standards Act. Before that was long overdue was bound to produce such a reaction. Labor's favored position during the thirties, however, led to the abuse of power and privilege in some cases. It soon became evident that the Wagner Act needed revision. This reform finally found expression in the Taft-Hartley Act of 1947. Certain provisions of the Act deal with the labor injunction, and the question arises as to whether the labor injunction will once again assume an important role in the American labor scene.

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1. Charles O. Gregory, Labor and the Law (New York: W. W. Norton & Company, Inc., 1946), p. 187.

The potentialities of the labor injunction as an employer's weapon were first made manifest in the famous Debs Case of 1894. For the next two decades every economic weapon that could be mustered by labor--strikes, picketing, and boycotts--was of no effect when it was countered with the labor injunction. At times the use of the injunction seemed to infringe upon basic American freedoms, and its use almost exclusively in the interest of management gave grounds to the charge that Americans were being treated as two different classes of citizens. In practice the injunction would swiftly paralyze a strike or a boycott, but injunctive procedure was such, however, that it moved agonizingly slow in removing the entangling mass of litigation in which the situation had become emeshed. The injunction became the scourge of American labor, and labor leaders attacked the use of the injunction in labor disputes. As the number of labor injunction cases in the courts multiplied, the opposition to the use of the labor injunction became more vociferous and vehement. Eventually Congress saw the need for offering labor some relief from the injunction and from the anti-trust laws which were often used in connection with the injunction. To accomplish this purpose the Clayton Act of 1914 contained some labor provisions which many believed to restrict the use of the labor injunction. Labor leaders prematurely called the Clayton Act the "Magna Carta" of labor, but the Supreme Court did not choose to interpret it that way. Apparently the intent of Congress had been obscure, and more labor injunctions were issued under the Clayton Act than ever before.[2]

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[2] "Sections 17, 18, and 19 of the Clayton Act were intended to correct [certain procedural abuses of the labor injunction]. They have now been 'the law of the land' for fourteen years. What have they accomplished? More restraining orders without notice have been granted by federal courts within that period of time than in any prior period of like duration." Felix Frankfurter and Nathan Greene, The Labor Injunction (New York: The Macmillan Company, 1930), pp. 185-186.

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That the injunction not only survived that piece of legislation, but even emerged stronger showed that here was an inherent and integral part of our legal heritage that could not easily be changed. Our legal system has been formed through evolution, not revolution. The change is painfully slow, retarded as it is by precedent and tradition. What at times may appear as a change may be merely an aberration. It is surprising then that so much was expected of the Clayton Act.[3]

When labor became convinced that it could expect no succor from the injunction under the Clayton Act as it was interpreted by the Supreme Court, it renewed its agitation for anti-injunction legislation. This campaign finally came to fruition in 1932 with the passage of the Norris-LaGuardia Act. The Norris-LaGuardia Act afforded labor the first real relief from the labor injunction. The intent of Congress in this case was clear. The Act did not outlaw the injunction, but it restricted its use to acts of fraud or violence. Thus limited in scope, the labor injunction was gradually discarded by the employer. The Taft-Hartley Law, has, however, brought the labor injunction back into the limelight by widening its scope once more.

It is because the labor injunction is still a live factor and may become as controversial as it once was that inspired the writing of this thesis. This study hopes to achieve a greater understanding and to clear up many misconceptions concerning the federal labor injunction.

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[3] "The Clayton Act was the product of twenty years of voluminous agitation. It came as clay into the hands of the federal courts, and we have attempted a portrayal of what they made of it. The result justifies an application of a familiar bit of French cynicism: the more things are legislatively changed, the more they remain the same judicially." Ibid., p. 176.

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CHAPTER II

PURPOSE

Prior to the passage of the Norris-LaGuardia Act, the injunction inspired fear and hatred among the ranks of labor. In the heated controversy that surrounded the issue, many charges were hurled against the injunctive process. In such an atmosphere, however, confusion inevitably results. An attack upon what are believed to be a few bad features rapidly degenerates into an attack upon the whole. A blindness incurred by hatred removes all reason from the scene. Soon it was no longer the alleged abuses of the injunction that inspired the wrath of its opponents; the entire injunctive process was under fire. The very word injunction incurred the anathema of its critics. The word became a rallying point for hatred; the mere mention of it precluded logical evaluation of both its good points and its bad.[1] The word became a symbol. How dangerous that can be! A poet was unfortunate enough to have a name like a conspirator. The mob shouted: "It is no matter, his name's Cinna; pluck but his name out of his heart, and turn him going."[2]

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[1] Labor began to distrust all law. "Organized labor views all law with resentment because of the injunction . . . " Frankfurter and Greene, op. cit., p. 52; same page quotes Vice-President Matthew Woll (AFL) from The New York Times, February 8, 1928, p. 27, col. 8: " . . . No other country in the world permits its laborers to be harassed and oppressed by the use of the injunctions in labor disputes . . . we must abolish and wipe out this iniquitous menace which threatens to undermine our industrial supremacy and establish class distinction and class hatred."

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CHAPTER II

EVIDENCE

Prior to the passage of the Norris-LaGuardia Act, the injunction inspired fear and hatred among the ranks of labor. In the heated controversy that surrounded the issue, many charges were hurled against the injunctive process. In such an atmosphere, however, confusion inevitably resulted. An attack upon what one believed to be a few bad features rapidly degenerated into an attack upon the whole. A bitterness incurred by hatred removes all reason from the scene. Soon it was no longer the alleged abuses of the injunction that inspired the wrath of its opponents; the entire injunctive process was under fire. The very word injunction incurred the emblems of its critics. The word became a rallying point for hatred; the mere mention of it precluded logical evaluation of both its good points and its bad.[1] The word became a symbol. Her dangerous that can be. A poet too unfortunate enough to have a note like a conspirator. The mob shouted: "It is no matter. Hit Samuel Gompers; pluck out his name out of his heart, and turn him going."[2]

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This study will seek out those basic issues, shorn of all emotionalism, which were the actual causes of the heated controversy that finally culminated in the passage of the Norris-LaGuardia Act. It will be the purpose of this thesis to analyze the alleged abuses of the injunctive process and to examine the effect of federal legislation upon the labor injunction.

CHAPTER III

SCOPE AND LIMITATIONS

In achieving certain specific objectives this thesis will at the same time give an overall picture of the federal labor injunction, viz., no attempt will be made to spotlight certain aspects of the injunctive process. Continuity will be sought with events falling in their proper sequence. Thus those events which concern the thesis primarily will not be lifted out of their context, but will be supported by an accumulation of experiences which provide a climate of understanding and clarification. There will be no pretence, however, to exhaustive and extensive coverage. The study will aim at conciseness but not at the sacrifice of comprehensiveness and coherence. It will be a representative piece of the injunction pie, so that upon sampling it, one will know how the rest of the pie tastes and what its ingredients are; its dimensions will be such as to convey the size and shape of the whole pie.

To achieve this it will not be necessary to follow all of the legal aspects of the injunction with all of the ramifications involved. That would be a study in itself. For the purpose at hand only those legal aspects will be covered that must necessarily serve as tools or frames of references in accomplishing the task. The study will be limited to the federal labor injunction, and the landmark cases that were considered by the Supreme Court will receive chief attention. The federal labor injunction will be treated as part of the overall story of the economic struggle between capital and labor, and the vicissitudes of this struggle

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and all pertinent labor legislation will receive proper attention.

CHAPTER IV

TERMINOLOGY

Since the injunction issues from a court of equity, greater understanding of the injunctive process may be achieved if an inquiry is made into the principles of equity and other legal aspects surrounding the injunction.

A distinction should be made first of all between substantive law and remedial law. Substantive law is that body of law "which creates, defines, and regulates rights."[1] The common and statutory law is substantive law.[2] Remedial (or adjective law) "prescribes the method of enforcing rights or obtaining redress for their invasion."[3] It is remedial law "which provides for legal protection through injunction or damage suit"[4] if the rights defined by substantive law have been violated, or a violation of them has been threatened.[5]

Circumstances may prevail, however, when there is no adequate remedy at law to protect property from irreparable damage. Remedial

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[1] Henry C. Black, Black's Law Dictionary (2nd Edition; St. Paul, Minn: West Publishing Co., 1910), p. 1118.

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relief may then be sought from a court of equity. Equity as used here refers to "that portion of remedial justice which was formerly administered in England by the high court of chancery."[6] It differs from the common law in that "it administers and adjusts common-law rights where the courts of common law have no machinery."[7] Thus resort may be had to equity, only when there is no adequate remedy at law.[8] Another stipulation is: "He who comes into equity must come with clean hands."[9] That is, the court will not "aid a wrongdoer and enforce for his benefit an illegal or immoral contract."[10] Other principles of British equity which bear on the labor injunction are: "Equity has no jurisdiction over crimes;"[11] it must "never be used to curtail personal rights,"[12] and it is "to be exercised for the protection of property rights only."[13]

Equity is peculiar as compared to common law in that it "supplies a specific and preventive remedy for common-law wrongs where courts of common law only give subsequent damages."[14]

The advantages of equity law can be better understood by citing

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[7] Black, op. cit., p. 443.

[8] Charles E. Chadman, editor, Cyclopedia of Law (Chicago: DeBower-Elliott Company, 1905), VIII, 190.

[9] Ibid., p. 195.

[10] Ibid., p. 197.

[11] Ibid., p. 190.

[12] John P. Frey, The Labor Injunction (Cincinnati: Equity Publishing Company, 1922), p. 10.

[13] Ibid., p. 9.

[14] Black, op. cit., p. 433.

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an example of equity in operation. A man may have a piece of property along whose boundary stand a row of stately and imposing cypress trees. The man takes great pride in these trees which enhance the beauty of his estate. To him they have a great aesthetic value, and he is never prouder than when visitors comment upon their beauty. Then one day the adjacent property is purchased by an aviation enthusiast who wants it for a private air field. The flat land is excellent for that purpose; the only thing standing in the way are the tall trees which are hazardous to landing planes. A boundary dispute develops. The new neighbor claims that the trees are actually on his property, and proceeds to cut them down despite the owner's protest. The owner could later sue in a common-law court. If it were then found that the trees were on his property, he would be awarded money damages. But that would not restore to him the aesthetic value that the trees had for him. The trees themselves could not be restored--the damage had been irreparable. A court of equity, however, could have prevented the destruction of the trees. Upon the threatened destruction of the cypress trees, their owner could have applied to a court of equity for an injunction. This would have prevented the neighbor from chopping them down until the court had had an opportunity to study all of the facts in the case, and the true boundary determined. In this case the rights of both parties would have been protected. If it were found that the property belonged to the first mentioned party, no irreparable damage to the trees would have ensued. If, on the other hand, the owner of the air field had legitimate claims to the property, he could have proceeded to cut them down. Equity would have been done.

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according to the circumstances of the case commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience."[15] Thus an injunction can be either mandatory or preventive in nature. Mandatory in that it commands specific performance of some act. This does not mean that it commands correction of some wrong already done--that is, redress. Its purpose rather is to prevent further injury.[16] Preventive in that it orders one or more individuals to "refrain from doing certain acts."[17] In this case the acts have been "unperformed" or "unexecuted", and it is the purpose of the injunction to "prevent a threatened but nonexistent injury."[18]

There are three general classes of injunctions: Temporary restraining order; temporary injunction; and permanent injunction. A temporary restraining order "is an order granted to maintain the subject of controversy in statu quo [sic] until the hearing of an application for a temporary injunction."[19] This restraining order was usually issued ex parte;[20] that is, without notice or hearing. The defendant was then notified that the complainant was petitioning the court for a temporary injunction. He was required to appear in court on a certain day to show

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[15] Mack and Hale, op. cit., XXXII, 19.

[16] Ibid., XXXII, 22.

[17] Earl W. Mounce, editor, Prentice-Hall Labor Course (New York: Prentice-Hall Inc., 1946), p. 523.

[18] Mack and Hale, op. cit., XXXII, 21-22.

[19] Ibid., XXXII, 27.

[20] Injunction procedure is being described here as it existed prior to passage of the Norris-LaGuardia Act. Changes and criticisms will be discussed in later sections.

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cause why a temporary injunction should not be issued against him to restrain him temporarily "from committing the unlawful acts alleged in the complaint."[21] This was not a final hearing. It was notice and opportunity to be heard; the parties presented affidavits and sometimes witnesses were examined.[22] If the judge saw cause, he could then issue a temporary injunction.

A temporary injunction "is a provisional remedy . . . its sole object is to preserve the subject in controversy in its then existing condition . . . until a full and deliberate investigation of the case is afforded to the party."[23] It does not determine any question of right; it merely stops further wrong or irreparable injury until a full hearing. When the judge granted it, the case was set down for trial. After a full hearing, the court could either set aside the temporary injunction or grant a permanent injunction. It is important to note that the trial was without benefit of a jury "as the Constitution does not guarantee the right of trial by jury in equity cases."[24]

A permanent injunction "is one granted by the judgment which finally disposes of the injunction suit."[25] It is the final judgment. Its aim is beyond "provisional remedies;" it is in its essence "final relief."[26]

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[21] Mounce, op. cit., p. 526.

[22] Loc. cit.

[23] Mack and Hale, op. cit., XXXII, 20.

[24] Mounce, loc. cit.

[25] Mack and Hale, op. cit., XXXII, 21.

[26] Loc. cit.

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[23] Black and Hale, op. cit., XXXII, 20.

[24] Monroe, loc. cit.

[25] Black and Hale, op. cit., XXXII, 23.

[26] Loc. cit.

One other type of injunction needs to be mentioned, and that is the "blanket" or "omnibus" injunction. This foresees that the acts enjoined may be attempted by other persons than those named in the injunction suit. To overcome this, it brings "within the area of potential contempt the conduct of all undefined persons who in the future might threaten or encourage or commit violation . . . of forbidden acts."[27] This type of injunction was issued in the Debs Case[28] enjoining the defendants "and all persons combining and conspiring with them and all other persons whomsoever."[29] And again in the Tri-City Central Trades Council Case[30] which said in part:

> . . . the said defendants . . . and each of them, and all persons combining with, acting in concert with, or under their direction, control or advice, or under the direction, control or advice of any of them, and all persons whomsoever. . .[31]

Disobedience to the injunction places the offender in contempt of court. This puts teeth in the injunctive process--the procedure through which violations of the injunction may be punished. The violator may be punished either by a fine or jail sentence if he is found guilty of contempt. Prior to the Norris-LaGuardia Act the accused was tried by the same judge who issued the injunction.

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[27] Frankfurter and Greene, op. cit., p. 88. Phrase actually reads "ambiguous schedule of forbidden acts" but it is not feasible at this point to inject any criticism.

[28] In re Debs, Petitioner, 168 U. S. 564 (1895).

[29] Frankfurter and Greene, op. cit., p. 87.

[30] American Steel Foundries V. Tri City Council, 257 U. S. 184 (1921).

[31] Frankfurter and Greene, op. cit., p. 88.

One other type of injunction needs to be mentioned, and that is the "blanket" or "omnibus" injunction. This forecloses that the acts enjoined may be attempted by other persons than those named in the injunction suit. To overcome this, it brings "within the area of potential contempt the conduct of all undefined persons who in the future might threaten or encourage or commit violation . . . of forbidden acts."[27] This type of injunction was issued in the Debs Case[28] enjoining the defendants "and all persons conspiring and combining with them and all other persons whomsoever."[29] And again in the Tri-City Central Trades Council Case[30] which said in part:

> . . . the said defendants . . . and each of them, and all persons combining with, acting in concert with, or under their direction, control or advice, or under the direction, control or advice of any of them, and all persons whomsoever. . .

Disobedience to the injunction places the offender in contempt of court. This puts teeth in the injunctive process--the procedure through which violations of the injunction may be punished. The violator may be punished either by a fine or jail sentence if he is found guilty of contempt. Prior to the Norris-Laguardia Act the accused was tried by the same judge who issued the injunction.

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[27] Frankfurter and Greene, op. cit., p. 88. Thurman actually reads "omnibus schedule of forbidden acts" but it is not feasible at this point to inject any criticism.

[28] In re Debs, Petitioner, 158 U. S. 564 (1895).

[29] Frankfurter and Greene, op. cit., p. 87.

[30] American Steel Foundries v. Tri City Council, 257 U. S. 184 (1921).

[31] Frankfurter and Greene, op. cit., p. 88.

CHAPTER V

GENERAL PRINCIPLES GOVERNING ISSUANCE

In discussing equity, it was seen that certain stipulations must be present before equitable relief will be granted; and that certain principles govern the courts of equity. A further elaboration of these in connection with the issuance of the injunction will now be discussed.

Unless stipulated by statute, no one has an absolute right to injunctive relief. This lies in the discretion of the court and upon the circumstances of the case.[1]

The issuance of injunctions is not based upon precedent. That is, no precedent is needed. "If this was not so, and courts were confined to particular precedents, there would be no power to grant relief in new cases constantly occurring."[2]

"An injunction may be obtained to prevent an irreparable injury even though no such injury has yet occurred."[3] A threat to commit such injury is sufficient to obtain an injunction. Nor need the threat be actually made; if the conditions indicate that acts leading to irreparable damage are present, that is sufficient evidence.[4] In the example on page 17

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[1] Mack and Hale, op. cit., XXXII, 29.

[2] Ibid., XXXII, 34.

[3] Ibid., XXXII, 42.

[4] Ibid., XXXII, 45.

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1 Hook and Hale, op. cit., XXXII, 29.

2 Ibid., XXXII, 31.

3 Ibid., XXXII, 32.

4 Ibid., XXXII, 35.

an assembling of cutting tools near the trees is an indication of intent which may call for the issuance of an injunction.

Other conditions attending the issuance of the injunction are that the injury is continuing[5] or that it is substantial.[6]

Property is an important concept in connection with the issuance of an injunction. It has already been mentioned that equity is to be exercised solely for the protection of property rights.[7] This is not a new concept, but is as old as equity jurisprudence. The first injunctions were issued by British chancery to prevent irreparable injury to land.[8] The labor injunction has made use of this important concept. Frankfurter and Greene point out that property "has been the lattice-work upon which the labor injunction has climbed."[9] It is easy to understand the issuance of labor injunctions to protect tangible property from destruction. At first glance, however, it is hard to conceive of a labor injunction when no injury to tangible property is evident or is threatened; the misunderstanding is cleared away be defining what is meant by property. This is made clear in the following paragraphs:

> Destruction of Property and Business. Acts that will cause the destruction of complainant's property, or acts committed without just cause or excuse that interfere with the carrying

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[5] Ibid., XXXII, 46.

[6] Ibid., XXXII, 51.

[7] Supra, p. 17.

[8] Frankfurter and Greene, op. cit., p. 47.

[9] Ibid., p. 48.

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> Destruction of Property and Business. Acts that will cause the destruction of corporeal property, or acts committed without just cause or excuse that interfere with the carrying

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[5] Ibid., XXXII, 16.

[6] Ibid., XXXII, 51.

[7] Supra, p. 17.

[8] Frankfurter and Greene, op. cit., p. 17.

[9] Ibid., p. 18.

> on of complainant's business, destroying his custom, his credit, or his profits, do an irreparable injury and authorize the issuance of a preliminary injunction. It is elementary law that the right to conduct one's business without the wrongful and injurious interference by others is a valuable property right which a court of equity will not hesitate to protect by injunction.[10]
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> Since the right to carry on a lawful business without obstruction is a property right, acts committed without just cause or excuse, which interfere with the carrying on of complainant's business and destroy his custom, his credit, or his profits, do an irreparable injury and authorize the issuance of an injunction. It has accordingly been held that interference with complainant's employees and business by striking workmen . . . will be restrained in proper cases as causing irreparable injury.[11]

The Supreme Court put it more succintly. In Truax v. Corrigan it said: "Plaintiffs' business is a property right, and free access for employees, owner, and customers to his place of business is incident to such right."[12]

An injunction though wrongfully issued must be obeyed.[13] This is an old concept. In a volume written in 1821, the writer says: "An injunction, however erroneously granted is an order of court, and must be obeyed; if, therefore, the defendant or his attorney are guilty of a breach

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[10] Mack and Hale, op. cit., XXXII, 54-55.

[11] Ibid., XXXII, 155-156.

[12] Truax v. Corrigan, 257 U. S. 312 (1921); from opinion reprinted in Milton Handler, Labor Law (St. Paul, Minn.: West Publishing Co., 1944), p. 135.

[13] Infra, p. 122.

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of the injunction, it is a contempt which the court will punish."[14] A modern application of this concept in labor cases was made by the Supreme Court in Howat v. Kansas.[15] In that case the Supreme Court held that an injunction wrongfully issued could not be disobeyed; the correct procedure is to obey while awaiting appellate adjudication.

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[14] Robert Henley Eden, A Treatise On The Law Of Injunctions (London: Butterworth, 1821), p. 75.

[15] Howat v. Kansas 258 U. S. 181 (1922). Case discussed by Thomas R. Powell, "The Supreme Court's Control Over the Issue of Injunctions In Labor Disputes," Proceedings of the Academy of Political Science. Parker T. Moon, editor, XIII (1928), 70.

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CHAPTER VI

HISTORICAL BACKGROUND

It appears that the institution of equity or rather the concept of equity in its primordial state was intended to protect the weak and poor from the mighty and rich. Early laws tended to favor the rich, viz., the Code of Hammurabi. In that body of law it was written, for example:

> If a man has made the tooth of a man that is his equal to fall out, one shall make his tooth fall out.
>
> If he has made the tooth of a poor man to fall out, he shall pay one-third of a mina of silver.[1]

The rich and powerful, moreover, were oft beyond the pale of the law. The plebian did not dare to assert his rights against the patrician, nor the serf against the lord living in the manor. And if he dared, he did not have the price with which to purchase justice.[2]

The concept of equity was given expression in Rome in order to offer some protection to the poor. In 500 B. C. the plebeians combined to elect two tribunes annually "with extraordinary power to curb the political and economic oppression of the plebeians . . . These tribunes had the power of saying 'I forbid', if appealed to in judicial or legislative proceedings."[3] The institution disappeared upon the birth of the Roman Empire.

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[1] The Code of Hammurabi (V. F. Calverton, editor, The Making of Society, New York: Modern Library, 1937), p. 25.

[2] Infra, p. 29.

[3] Frey, op. cit., p. 1.

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The concept of modern equity had its origin in England. The common law began to develop first. It had its roots in the custom of the Saxons.[4] Through continual usage a body of unwritten law developed--the common law. Decisions were rendered orally; these oral decisions formed a precedent for other judges to follow. Thus the common law was based on oral tradition handed down from judge to judge.[5] Under such circumstances the law was not able to cope with novel situations for which there existed no precedent. Such was the legal system of England during the reign of Edward the Confessor (1042-1066). After the Norman Conquest (1066), William the Conqueror did not upset the legal structure. He did, however, reaffirm the principle that the king is the "fountain of justice" by establishing the Curia Regis, i.e., king's or royal court. Within this legal system a hazy notion of equity took root and later developed into the Court of Chancery.[6] One of the members of the Curia Regis was a person close to the king--the Chancellor. At first the Chancellor was the king's spiritual adviser; in time his duties expanded to those of secretary to the king. Since the early chancellors were ecclesiastics who advised the king on matters of conscience, the concept of conscience became an important factor in the development of equity jurisprudence. Archer in his History of the Law says that the first Chancellor was probably Arfastus, a chaplain to William the Conqueror.[7] The Chancellor gradually assumed

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[4] Harold L. Perrin and Hugh W. Babb, Commercial Law Cases (third edition; Boston: Blanchard Printing Company, 1932), I, 2.

[5] Gleason L. Archer, History of the Law (Boston: Suffolk Law School Press, 1928), p. 156.

[6] Ibid., p. 157.

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Meanwhile the common-law courts were proving entirely unsatisfactory in meting out justice. Limited by a rigid adherence to precedent and mired by set procedure, they were not able to give (and in some instances unwilling to give[8]) relief in all cases brought before them. A case in a law court began with a writ. The form of the writ became "fixed and rigid"[9] with the result that:

> . . . while ordinary actions had a corresponding writ, causes of action arose for which there was no writ, and the common-law courts refused modification of old writs for these cases.[10]

This state of affairs came to a head in the reign of Edward I. (1272-1307) when Parliament by the statute of Westminster (13 Edw. I., Chapter 24)[11] offered relief in those cases where there was <u>no adequate</u> remedy at law by allowing them to be referred to the Chancellor. It had already been the custom of the land to appeal to the king in matters of "grace", that is, "matters requiring special indulgence or provision."[12] Since the king was occupied with matters of state, the custom developed of petitioning the Chancellor rather than the king. Now official recognition had been given to this custom and the courts of chancery began to take shape. This fitted in with the scheme of things. Here was an ecclesiastic

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[8] Mack and Hale, <u>op. cit.</u> XXI, 23.

[9] Chadman, <u>op. cit.</u>, VIII, 179.

[10] <u>Ibid.</u>, VIII, 179-180.

[11] <u>Ibid.</u>, VIII, 180.

[12] Edward Jenks, <u>A Short History of English Law</u> (London: Methuen & Co.,

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There is an old Italian proverb which says, "I come for grace and you give me justice." Perhaps that expresses best what equity sought to do, it gave the petitioner grace. Justice said that if a wrong had been done, damages would be awarded. But it did not prevent this wrong. In some cases it did not offer any remedy. Equity through an injunction could restrain a threatened wrong. It afforded relief "more ample and complete than the law courts could give."[16] Thus the number of suits that were presented before the Court of Chancery began to increase. Equity jurisdiction was firmly established by the end of the Fourteenth Century as can be seen from a study of chancery cases.[17]

Another reason for the popularity of the Courts of Chancery was the expense of instituting a suit at law. Fines or fees had to be paid

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Ltd., 1934), p. 211.

[13] Chadman, op. cit., VIII, 178.

[14] Jenks, op. cit., p. 166.

[15] Chadman, op. cit., VIII, 179.

[16] Ibid., VIII, 182.

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for (1) acquiring justice and right, (2) writs, (3) pleas, (4) trials, (5) judgment, and, (6) expedition of pleas, trials, and judgment.

The Court of Chancery, however, was not free from faults. The fact that the Chancellor decided a case upon "good conscience" made him a rather arbitrary judge. The term was nebulous. What may mean "good conscience" to one man may be disapproved by another. This was especially noticeable whenever a new chancellor took office. In his famous "Table Talk" Selden described the situation thus:

> Equity is a roguish thing. For law we have a measure and know what we trust to. Equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. 'Tis all one if they should make his foot the standard for the measure we call a chancellor's foot. What an uncertain measure would this be? One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing as a chancellor's conscience.[18]

As the Court of Chancery developed, however, this criticism was less applicable. "Under the succession of able chancellors the jurisdiction of equity became firmly established, and its method of procedure uniform and complete."[19]

In the reign of Edward III. (1327--1377) the Court of Chancery began to sit regularly at Westminster, and, as was pointed out above, the number of cases began to increase. With the coming of Richard II in 1377

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[18] Mack and Hale, op. cit., XXI, 22.

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the courts of chancery began to protect "the poor and weak against the rich and powerful."[20]

By the time of Henry V. (1413-1422) the Court of Chancery had become well established and distinct from the common-law court. About the year 1500, the main differences between the two courts can be seen in the following chart:[21]

Common-Law Courts	Chancery Courts
1. Right	1. Grace
2. Writ (i.e., special form of action)	2. Bill (no form of action)
3. Pleadings (Oral?) to issue	3. Written pleadings (no issue)
4. No examination of parties	4. Defendant on oath
5. Precedent	5. Discretion
6. Jury	6. No jury
7. *In rem*	7. *In personam*
8. Open accusation	8. Open accusation
9. Reason given for judgment	9. Reason given for judgment

The growing power of the Court of Chancery was viewed with apprehension by the common-law courts. A struggle for supremacy ensued. Meanwhile the chancellors were no longer chosen from the ecclesiastics. In

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[20] *Ibid.*, VIII, 183. See also Francis Bowes Sayre, *Cases on Labor Law* (Cambridge, Mass.: Harvard University Press, 1922), p. 717, in which Sayre quotes Spence, *Equitable Jurisdiction of the Court of Chancery*, "The Chancellor, therefore, at the very outset of Richard's (i. e., Richard II-Ed.) reign, the king himself being of tender years, with the sanction no doubt of the Council, exercised an authority, especially in favor of the weak."

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1616 when Lord Ellesmere was Chancellor, the law courts under Sir Edward Coke, Chief Justice of the king's bench, resisted further encroachment upon their jurisdiction.[22] A case developed in the law court and the defendants applied to chancery for an injunction to restrain the proceedings. The matter was referred to the king who sided with the court of equity.[23]

This reaffirmed the power of the court of equity, and soon those principles of jurisprudence which governed it "became extended to nearly its modern scope."[24] Equity and law courts became two separate and distinct systems of jurisprudence in England, and continued in juxtaposition until the passing of the Judicature Act of 1873. This Act merged the two systems into one supreme court of which chancery became a division.[25]

The American Colonies which were settled by Anglo-Saxons, fell heir to English tradition, customs, and institutions. Early colonization took place at the time that equity jurisprudence received its major victory in England; thus the concept of equity became appended to the judicial system of the English Colonies.[26] The administration of equity, however, assumed different forms in the various colonies. In most of the

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[22] Chadman, op. cit., VIII, 184.

[23] Jenks, op. cit., p. 167.

[24] Mack and Hale, op. cit., XXI , 24.

[25] Loc. cit.

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[22] Chadman, op. cit., VIII, 1811.

[23] Jones, op. cit., p. 147.

[24] Hack and Hale, op. cit., XXI, 91.

[25] Loc. cit.

[26] Chadman, op. cit., VIII, 1811.

Colonies equity powers were bestowed upon the royal governor who exercised them conjunctionally with his council.[27] In the rest of the colonies save Pennsylvania, equity jurisdiction was vested in the legislative branch. Pennsylvania was the only one in which equity was not administered by a "tribunal distinct from the common-law courts."[28]

After the Revolution, the Federal Government and the several states gave official recognition to the concept of equity. The Constitution conferred upon the Federal Courts both equity and common-law jurisdiction.[29] In the Federal Courts law and equity are administered by the same court, but the procedure in each case is distinct. Many of the states follow this system. A second group of states have two distinct and separate courts administering law and equity. A third and final group have no distinction between actions in law and suits in equity. The same court rules in both cases, governed by codes establishing a uniform procedure.[30]

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[27] Loc. cit.

[28] Mack and Hale, loc. cit.

[29] The Constitution, Article III.

[30] Mack and Hale, loc. cit.

CHAPTER VII

THE IMMEDIATE BACKGROUND OF THE FEDERAL LABOR INJUNCTION

A judicial concept does not develop overnight, but evolves slowly through the years. Even that which may seem like a revolutionary piece of legislation is the result of years of experience, and is itself an area of experience which forms the basis for future law. Although the law evolves slowly, there are factors which are constantly exerting pressure on it to influence its future course. These forces are of various sorts such as economic or social. Baron De Montesquieu wrote that even the climate exerted an influence on the law of a country.[1] After years of relentless perseverance some particular force may gather sufficient strength to mark a change in the law which reflects its particular brand of philosophy. Needless to say, this change can only be transitory because, first, the ideas of men are always in a state of flux, and, second, opposing forces are ever at work. It is against such a background that the federal labor injunction developed; and such laws as the Norris-LaGuardia Act and the Taft-Hartley Act, which have affected the injunction, must be studied in the light of this background if they are to be clearly understood. Therefore, in order to get a proper insight into these two pieces of labor legislation and into the economic struggle between capital and labor in so far as it touches upon the labor injunction, it will be necessary to trace

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[1] Baron De Montesquieu, Of Laws In Relation To The Nature Of The Climate (V. F. Calverton, editor, The Making of Society, New York: The Modern Library, 1937), pp. 178 ff.

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the concepts around which the controversy first began to revolve--the doctrines of conspiracy and of restraint of trade.

THE DOCTRINES OF CONSPIRACY AND OF RESTRAINT OF TRADE

The doctrines of conspiracy and of restraint of trade have played an important role in the economic conflict and in the development of the federal labor injunction.[2] Developing through centuries the doctrine of conspiracy was crystallized into the following definition in 1842 by Chief Justice Shaw of Massachusetts: " . . . a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful by criminal or unlawful means."[3] A brief examination of the history of this doctrine is necessary if later interpretation of it are to be understood.

The drama began to unfold in England with the common-law conception of criminal conspiracy which was applied by the law courts as early as the fourteenth century.[4] A statute applying to conspiracy among journeymen was framed into law in 1548, aimed at incipient combinations of laborers. At this early date the idea that workers would combine to seek a better bargain with their employers was embryonic; still counteracting forces began

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[3] Commonwealth v. Hunt, 4 Metcalf 111, 123 (1842).

[4] Mounce, op. cit., pp. 105-106.

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[4] Mowrer, op. cit., pp. 165-166.

to germinate as can be seen from this law of 1548, Concerning Conspiracies of Journeymen, which read in part:

> Forasmuch as of late divers . . . labourers have made confederacies and sown mutual oaths not only that they should not meddle one with another's work, and finish that another hath begun, but also to appoint how much work they shall do in a day, and what hours they shall work . . . therefore it is enacted that if they shall not do their work but at a certain price or rate, or shall not take upon them to finish that another hath begun, or shall do but a certain work in a day, or shall not work but at certain hours and times, on conviction every person so offending shall forfeit ten pounds.[5]

Why it was unlawful for a group of men to do what was lawful for one man was explained in People v. Wilzig:[6] "A combination of men is a very serious matter. No man can stand up against a combination; he may successfully defend himself against a single adversary but when his foes are combined and numerous he must fall."[7]

In 1720 an attempt by journeymen tailors of London and Westminster to raise their wages and lower their hours of work was termed an unlawful conspiracy by Parliament which promptly passed a law against such actions:

> Whereas great numbers of journeymen taylors in the cities of London and Westminster have departed from their services without just cause, and have entered into combinations to advance their wages . . . and lessen their usual hours

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[5] 2 & 3 Edw. VI, c. 15, 1548, Concerning Conspiracies of Journeymen, from abridgment in Handler, op. cit., p. 3.

[6] People v. Wilzig, 5 Eliz., c. 4, 1562.

[7] Reprinted in Mounce, op. cit., p. 105.

to generalize as can be seen from this law of 1548, *Concerning Conspiracies of Journeymen*, which read in part:

> Forasmuch as of late divers . . . Labourers have made conspiracies and sworn mutual oaths not only that they should not meddle one with another's work, and finish that another hath begun, but also to appoint how much work they shall do in a day, and what hours they shall work . . . wherefore it is enacted that if they shall not do their work but at a certain price or rate, or shall not take upon them to finish that another hath begun, or shall do but a certain work in a day, or shall not work but at certain hours and times, on commination every person so offending shall forfeit ten pounds.[2]

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[7] Reprinted in Lemmon, op. cit., p. 105.

> of work, which action tends to the prejudice of trade, . . . therefore be it enacted that all contracts . . . between any persons . . . exercising the art of a taylor in the cities of London or Westminster, for advancing their wages, or for lessening their usual hours of work, shall be illegal, null and void.[8]

Again in 1721 a court of law indicted as conspirators a group of journeymen tailors who combined to raise their wages.[9]

The Combination Acts of 1799 and 1800 finally brought together all concepts of conspiracy as they were applied to labor. The Statute of 1799 sought to freeze the status of the workmen of England[10] by prohibiting them from organizing to improve their working conditions. In brief the Statute made collective action or collective bargaining unlawful.[11] By the Statute of 1800, "Societies for the collection of funds for the benefit of fellow-workmen were definitely forbidden."[12] The implications of these Acts were plain: to combine to raise wages and improve working conditions was an unlawful means to accomplish a criminal purpose. Trade unions were henceforth illegal, but apparently the Combination Acts did not destroy

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[8] 7 George I., Stat. 1, c. 13, 1720 from abridgement in Handler, op. cit., p. 5.

[9] Rex v. Journeymen-Taylors of Cambridge (King's Bench, 1721. 8 Mod. 10), " . . . it is for a conspiracy to raise their wages, for which these defendants are indicted. It is true, it does not appear by the record that the wages demanded were excessive; but that is not material . . ." From Court's opinion; case reprinted in ibid., p. 2.

[10] "Every journeyman or workman or other person who shall enter into any combination to obtain increased wages, or to lessen or alter the hours of work . . . shall be committed to the common goal . . . " From abridgement of the Combination Act of 1799, ibid., p. 6.

[11] Loc. cit.

[12] Abbott P. Usher, The Industrial History of England (Boston: Houghton Mifflin Co., 1920), p. 379.

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them for they continued to exist surreptitiously. The Acts of 1799 and 1800 were repealed in 1824 in an effort to dissolve this clandestine labor movement. Francis Place, who did more than anyone else to bring the Repeal of 1824, wrote: "Combinations will soon cease to exist. Men have been kept together for long periods only by oppression of the laws, these being repealed, combinations will lose the matter which cements them into masses and they will fall to pieces."[13] The Act of 1824 further provided that prosecution of workmen under common and statutory law should cease.[14]

The passage of the Act had an unexpected result. Rather than disintegrating, the combinations of workmen became aggressive, and a series of strikes and boycotts was touched off which spread throughout England. Counteraction was instantaneous--the Act of 1825 which neutralized the Act of 1824. The results, however, were not as bad as might be expected. The Act allowed the principle of the open shop, and workmen could combine to determine "rates of wages and hours of work."[15] Workmen, however, were subject to prosecution for conspiracy under the common law.[16] This permitted the common-law judge much leeway in interpreting the doctrine of conspiracy especially when the doctrine of restraint of trade was applied. Thus any

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[15] Usher, op. cit., p. 385. The open shop means no union recognition--a nonunion shop. Its use here implies, however, that while workers were free to join the union they could not refuse to work alongside non-union men, nor could they compel the employer to recognize their union.

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Labor finally received real succor from the doctrines of conspiracy and restraint of trade with the passage of the Conspiracy and Protection Act of 1875 which "removed the threat of criminal conspiracy to labor unions."[18] By this time, however, one of the first labor injunctions had already been issued in England.[19]

The doctrines of conspiracy and of restraint of trade dominated the attitude of the American law courts towards labor. Drawing copiously from English precedent, the courts condemned early attempts of labor to organize as conspiracies. Between 1806 and 1815 there were six conspiracy cases which are now grouped under the title of the Cordwainers' Conspiracy cases. In 1806 a group of Philadelphia journeymen shoemakers were convicted of conspiracy for attempting to raise their wages.[20] The attitude of the Court in this case was: "A combination of workmen to raise their wages may be considered in a two fold point of view: one is to benefit themselves . . . the other is to injure those who do not join their society. The rule

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[17] Ibid., p. 386.

[18] Mounce, op. cit., p. 108.

[19] Springhead Spinning Co. v. Riley, L. R. Eq. 551 (1868), see infra, p. 44; The labor injunction, however, did not take root in England. The legal struggle took a different turn there; it centered around the ramafications of the Act of 1875 with labor suffering set backs in the decisions rendered in Quinn v. Leathem and the Taff-Vale Case and gaining ground in the Trades Disputes Act of 1906 which nullified the effects of the Taff-Vale Case.

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of law condemns both."[21] In this case the purpose for which the shoemakers combined was held unlawful. The reaction against this decision was so strong, however, that the remaining five cases were tried on the basis of unlawful means. In a New York case[22] in which striking journeymen shoemakers were found guilty, the prosecution was more forceful. "A conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them to do, if they had not conspired to do it."[23] Thus a combination to better working conditions was held unlawful on the a priori grounds that it was a conspiracy. The shoemakers were convicted in four of these six conspiracy cases. In one the decision was a compromise (Pittsburg, 1814), and the sole victory for the shoemakers occurred in Baltimore in 1809.

In 1821 a combination of master shoemakers to lower wages was not deemed a conspiracy by a Pennsylvania judge. The Court held that as long as the masters did not push wages below their "natural level" no conspiracy existed. But in three other cases in this second group of conspiracy cases, journeymen were found guilty of conspiracy in seeking to better their working conditions. These included the New York hatters in 1823, the Buffalo taylors in 1824, and the Philadelphia taylors in 1827.[24]

The next important wave of conspiracy cases occurred between 1829

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21 Reprinted in part, loc. cit.

22 People v. Melvin, Select Cases, 11, 219, (N. Y., 1810).

23 Reprinted in part in Frankfurter and Greene, op. cit., pp. 2-3.

24 All of these conspiracy cases are discussed in Selig Perlman, A History of Trade Unionism in the United States (New York: The Macmillan Company, 1923), Chapter 7.

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and 1842. One of the most important of these cases was that of People v. Fisher.[25] In this case certain journeymen shoemakers of Geneva, New York, struck to induce the discharge of a worker who persisted in working below the union rate of wages. Justice Savage ruled that the journeymen were guilty of a conspiracy to raise wages, and that this was injurious to trade and in violation of a New York statute passed in 1829. In 1836 a group of New York taylors struck when their wages were lowered, and they picketed the shops of the masters. Twenty of the leaders were arrested and tried for conspiracy. Judge Edwards, acting largely on the strength of People v. Fisher, called the taylors' society an illegal combination and instructed the jury to hand in a verdict of guilty. These two cases produced a violent reaction. There were many demonstrations, and Judges Edwards and Savage were burned in effigy. This reaction influenced the decisions in the succeeding conspiracy trials, and in 1836 the shoemakers in Hudson, New York, and the plasterers in Philadelphia were acquited after jury trials.[26] Finally in 1842 the doctrine of conspiracy was rendered innocuous to those combinations which used legal means to achieve legal ends. This was the famous case of Commonwealth v. Hunt.

COMMONWEALTH v. HUNT[27]

The case of Commonwealth v. Hunt, by establishing a new precedent in the common-law doctrine of conspiracy, was one of the factors that

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caused employers to turn to more effective legal means in an effort to curb labor. The courts of equity could issue labor injunctions as had been demonstrated in England, and after 1890 the Sherman Act codified the doctrines of conspiracy and restraint of trade, so that here was a new source of succor. But first it would be well to discuss the accomplishments of the case of Commonwealth v. Hunt.

Briefly, the indictment alleged that the defendants, journeymen bootmakers, "unlawfully" formed themselves into the Journeymen Bootmakers' Society agreeing not to work for anyone employing a non-member, or a member not in good standing; that they compelled master cordwainer Wait to fire journeyman Horne because he was not a member in good standing; that they unlawfully conspired "to prevent Horne from following his trade and by indirect means to impoverish him;" and that they unlawfully conspired to impoverish Wait and hindered him and others from employing non-members and members not in good standing.

The allegations were rejected. It was held "that there was no sufficient averment of any unlawful purpose or means."

In his opinion Chief Justice Shaw found that the banding together of persons in a like occupation was not an unlawful purpose.[28] Thus a new interpretation was put upon purpose, and purpose became a "vital consideration."[29] The gist of it was that labor unions were not illegal.

Chief Justice Shaw then examined the means employed by the

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[28] "The manifest intent of the association is, to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful.", Shaw, J. C., Ibid., p. 129.

[29] Frankfurter and Greene, op. cit., p. 4.

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bootmakers to achieve their objectives. He found that these amounted to a withholding of their labor from anyone employing a non-member. He held that this was not an illegal means but merely an exercise of the workers' right to work for whom they pleased.[30] Chief Justice Shaw further pointed out that as the bootmakers did not resort to "force or fraud" in inducing Wait to fire Horne but merely withheld their labor, they were merely exercising their rights.[31]

This case in effect gave legal sanction to unions, the closed shop, and the strike weapon. It did not stop at once the prosecution of labor unions on the grounds that they were labor unions, but it did open the path for their recognition. Its greatest contribution in the field of labor law was that thenceforth the law courts scrutinized more closely the "ends" and "means" of labor organizations.[32]

After Commonwealth v. Hunt, the doctrine of conspiracy diminished

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30 " . . . The means which they proposed to employ . . . were, that they would not work for a person, who, after due notice, should employ a journeyman not a member of their society. . . . we cannot perceive, that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interest." Shaw, J. C., Commonwealth v. Hunt, (4 Met. 111) p. 130.

31 " . . . But further; if this is to be considered as a substantive charge, it would depend altogether upon the force of the word 'compel', which may be used in the sense of coercion, or duress, by force or fraud . . . But whatever might be the force of the word 'compel', unexplained by its connexion, it is disarmed and rendered harmless by the precise statement of the means, by which such compulsion was to be effected. It was the agreement not to work for him, by which they compelled Wait to decline employing Horne longer. . . . We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another . . . and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited." Ibid., pp. 133-134.

32 Frankfurter and Greene, op. cit., pp. 4-5.

bootmakers to achieve their objectives. He found that these amounted to a withholding of their labor from anyone employing a non-member. He held that this was not an illegal cause but merely an exercise of the workers' right to work for whom they pleased.[30] Chief Justice Shaw further pointed out that as the bootmakers did not resort to "force or fraud" in inducing men to join but merely withheld their labor, they were merely exercising their rights.[31]

This case in effect gave legal sanction to unions. He closed shop, and the strike weapon. It did not stop at once the prosecution of labor unions on the grounds that they were labor unions, but it did open the path for their recognition. Its greatest contribution in the field of labor law was that thereafter the law courts scrutinized more closely the "ends" and "means" of labor organizations.[32]

After Commonwealth v. Hunt, the doctrine of conspiracy diminished

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in importance, and the next big wave of court action against labor took the form of the injunction used together with the doctrine of conspiracy and of restraint of trade as set forth in the Sherman Anti-Trust Act of 1890.[33]

EARLY LABOR INJUNCTIONS

Springhead Spinning Co. v. Riley[34]

The labor injunction made its debut in England in the case of Springhead Spinning Co. v. Riley in 1868. In this early case an organization of cotton workers struck against their employer, the Springhead Spinning Co., Ltd., when the latter put forth a "proposed readjustment of wages." The cotton workers then "caused" signs to be put up on the walls and public places of the towns of Springhead, Lees, and Oldham. Like notices also appeared in the Manchester Guardian. They read as follows:

> Wanted all well-wishers to the Operative Cotton Spinners, etc., Association not to trouble or cause any annoyance to the Springhead Spinning Co., Lees, by knocking at the door of their office until the dispute between them and the self-actor minders is finally terminated. By special order.

It was alleged by the plaintiffs that this was part of a "scheme" of "threats and intimidation" whereby prospective employees were prevented from seeking employment with the plaintiffs. They pointed out that they had a large business and an enormous goodwill, and in order to maintain

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33 "After Commonwealth v. Hunt came a forty years' lull in the courts' application of the doctrine of conspiracy to trade unions." Perlman, op. cit., p. 152.

34 L. R. 6 Equity, 551 Chancery, 1868; case reprinted in Sayre, op. cit., pp. 719ff.

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this goodwill, the plant had to be in operation. The defendants by preventing hiring were causing "irreparable damage to the corpus of their property." The plaintiffs asked the court to restrain the defendants from printing and publishing the aforementioned notice, and the Court so granted.

In finding for the plaintiffs, Sir Malins, the Vice Chancellor, called the signs illegal because of their intimidating nature. He said: "It is clear, therefore, that the printing and publishing of these placards . . . admittedly for the purpose of intimidating workmen from entering into the service of the plaintiffs are unlawful acts, punishable by imprisonment . . . and a crime at common law." The Court recognized that if the actions of the defendants were criminal, it had no jurisdiction.[35] But it did have jurisdiction to protect property, and though alleged criminal actions were involved, an injunction was issued. The Court put forth the rhetorical question: Why shouldn't the defendants be restrained if they proceed to destroy the plaintiffs' property "by their threats and intimidation rendering it impossible for the plaintiffs to obtain workmen, without whose assistance the property becomes utterly valueless for the purpose of their trade?" The injunction was issued to prevent such destruction of property.

This case raised many of the questions that became the subject of the labor-injunction controversy in the United States. What is meant by intimidation and threats? Could such a sign as was displayed by the defendants be called an intimidation? Would it be destructive to property? What is property? Is it the right to hire? Can a court of equity infringe

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[35] Supra, p. 17, a court of equity has no jurisdiction over crimes.

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upon basic freedoms in protecting property? Can a court of equity infringe upon the police powers of the State in protecting property? These are some of the questions that will be discussed in connection with the Federal labor injunction.

After this early case the labor injunction was not used extensively in England,[36] and the opinion of Vice Chancellor Malins was criticized in a later English case.[37] In the United States the story was different. After the Springhead Spinning Co. Case, the labor injunction began to crop up with increasing frequency in the state courts. An early attempt in New York failed because the judge "did not believe that the facts as found were tortious . . . "[38] Other attempts, however, met with success.[39] And in 1888, a classic decision was rendered in Massachusetts restraining picketing. The labor injunction had arrived. It needed but to be tested in the Federal Courts.

Sherry v. Perkins[40]

This Massachusetts case was similar in many respects to its

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36 "An injunction was granted in a labor dispute [in England] as early as 1868. But in England resort to the injunction has not been frequent and it has played no appreciable part there in the conflict between capital and labor.", Mr. Justice Brandeis in Truax v. Corrigan, 257 U. S. 312, case reprinted in Handler, op. cit., p.138.

37 "The opinion in support of this decision (i. e., Springhead Spinning Co. v. Riley) was strongly disapproved by the court of appeal in Prudential Assurance Co. v. Knott, L. R. 10 Ch. 142.", Sayre, op. cit., p. 723; "and Chief Justice Gray of the Supreme Judicial Court of Massachusetts . . . declared that it appeared to be so 'inconsistent with' the authorities 'and with well settled principles, that it would be superfluous to consider whether upon the facts before him (Malins), his decisions could be supported.'" (Boston Diatite Co. v. Florence Mfg. Co., 14 Mass. 69, 70), ibid., pp. 723-4.

38 Johnston Harvester Co. v. Meinhardt, 60 How. Pr. 168 (N. Y. 1880).

39 Ohio, Baltimore, and Iowa. Frankfurter and Greene, op. cit., p. 21.

40 Sherry v. Perkins, 147 Mass. 212 (1888).

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[40] Sherry v. Perkins, 147 Mass. 212 (1888).

English predecessor. Sherry, a shoe manufacturer in Lynn, alleged that some of his workers belonging to the Lasters' Protective Union struck and "caused to be carried in front of Sherry's factory, by a boy hired for that purpose, a banner bearing the following inscription:

> Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U.

The allegation further said that the banners were a scheme to prevent egress to the plaintiff's property and that the goodwill of the company was being destroyed. The prayer that " . . . the defendants might be restrained from making such banners and from causing them to be similarly carried . . . " was granted by Justice Allen. As in the Springhead Spinning Co. Case, the Court called the banners illegal because of their intimidating nature. The signs tended to injure Sherry's property, but no adequate relief could be secured from a suit at law. In granting the injunction Justice Allen said:

> The scheme in pursuance of which the banners were displayed and maintained was to injure the plaintiffs' business, not by defaming it to the public, but by intimidating workmen, so as to deter them from keeping or making engagements with the plaintiffs. The banner was a standing menace to all who were or wished to be in the employment of the plaintiffs, to deter them from entering the plaintiffs' premises. Maintaining it was a continuous unlawful act, injurious to the plaintiffs' business and property, and was a nuisance such as a court of equity will grant relief against.

To support its opinion the court cited the decision in Springhead Spinning Co. v. Riley. Not unaware that the latter decision was in ill repute in England, it grudgingly added: "Some of the language in Springhead Spinning Co. v. Riley has been criticized but the decision has not

been overruled."

The similarity between these two cases is interesting in view of the procedure and findings of later federal cases. In both cases two basic rights came into conflict--a personal right and a property right--with the outcome hanging on the thin thread of the court's interpretation. It depended upon the court to rule whether the language used was intimidating, and, if so, whether it was destructive to property. This involved a keen definitive analysis of terms on the part of the judge who had to rely on discretion.[41] It really became a problem in semantics. On his part the claimant, as can be seen from comparing these two cases, by using such stereotyped words as intimidation, loss of goodwill, and destruction to property, which had already proved a successful formula, was virtually assured injunctive relief. It remains to be seen if such was the course followed in federal cases.

THE SHERMAN ACT OF 1890

While the labor injunction was developing in the state courts, Congress passed the Sherman Act which was to form the basis for the use of the injunction in the federal courts. The argument has long raged as to whether Congress intended the Act to apply to labor, but to reargue to issue here would be superfluous and fruitless.[42] It would not be amiss, however, to discuss some of the background of the Act to better understand the

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[41] " . . . judges who granted injunctions almost necessarily exercised considerable discretion." John R. Commons and John B. Andrews, Principles of Labor Legislation (fourth revised edition; New York: Harper, 1936), p. 44.

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position of the courts and why labor took exception to the courts' rulings.

In the latter part of the nineteenth century the United States was rapidly becoming industrialized. Immigration swelled the population; new resources were discovered and exploited; innovations followed in rapid succession; and there was plenty of land to catch the overflow of all this expansion. The railroads, pushing ever westward, widened the market, and industry grew to enormous proportions to meet the demand. Bigness, however, soon gave way to monopoly as the industrialists vied with one another to capture the market in order to get larger profits. In some cases competitors were driven out of business in murderous price wars. The larger industrial magnates would either buy up their smaller competitors or drive them out of business by underselling them.[43] A more refined method was that of merger and consolidation. Combinations were formed which made it possible for "Prices" to be "fixed without benefit of competition, and sometimes at higher levels than before the trust was formed. Raw producers were compelled to take what the trust chose to pay, for there was no one else to whom to sell."[44] Such was the situation about 1890 with the consumer and small business at the mercy of whiskey, sugar,

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[43] Rockefeller of Standard Oil was such a giant. " . . . he bought up whatever refineries would sell, induced others to join forces with him, and drove still others out of business." John D. Hicks, The American Nation (Boston: Houghton Mifflin Co., 1943), p. 176; "Price-cutting was carried to any extreme necessary to put a competitor out of business . . . " loc. cit. As for railroads, they found "it was easier to steal existing traffic than to create new business.", Ernest L. Bogart and Donald L. Kemmerer, Economic History of the American People, (New York: Longmans, Green and Co., 1942), p. 603; and " . . . a series of ruinous rate wars was initiated by the efforts of the competing roads to divert as much of their rivals' business to themselves as possible." Ibid., p. 608.

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match, lead, and a myriad other trusts. The situation came to a head when "American trusts had become sufficiently threatening for the independent producers, who were still politically dominant, to attempt to stop their growth once and for all. They succeeded in passing the Inter-State Commerce Law of 1887 and the Sherman Anti-Trust Law of 1890."[45]

It will be noted that it was combinations of capital and not of labor that led to the Sherman Act. The animosity of Congress in debating the measure was clearly directed against the former type of combinations.[46] In the Congressional debates preceding its passage, it occured to some of the senators that the Act could conceivably be applied against labor. Some felt that this point should be cleared up. Senator Teller, speaking on the floor of the Senate, said:

> I know that nobody proposes to interfere with the class of men (laborers) I have mentioned. Nobody here intends that by any of these provisions either in the original bill or in any amendment. . .[47]

Senator Stewart also expressed the same sentiments.[48] No one

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[45] John Strachey, The Coming Struggle For Power, (New York: The Modern Library, 1935), p. 71.

[46] Both Berman and Gregory argue strongly that the Act did not apply to labor, and one is struck by the similarity of their views: "Everyone who knows the history of that act is aware that the sole intent of its framers, and of practically every member of Congress who gave the matter thought, was to find some means of restricting the pernicious activities of the trusts." Edward Berman, Labor Disputes and the President of the United States (New York, Longmans , Green & Co., 1924), pp. 31-32. "Everyone knew why the act was passed in 1890. It was in response to popular demand aroused by the fear of gigantic industrial and commercial enterprises which threatened to seize control of the manufacturing and marketing of consumer goods of all kinds." Gregory, op. cit., p. 202.

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argued against this. This was on March 25, 1890. On that same day Senator Sherman offered a proviso excluding labor and farm organizations from the terms of the Act. The amendment was approved by the Senate.[49] The entire bill was reported back to the Committee on the Judiciary on March 27. On that day only one senator spoke against the Amendment excluding labor. That was Senator Edmunds of Vermont. He was answered by Senator Hoar of Massachusetts who distinguished between combinations of capital and of labor. The former he found undesirable; of the latter, he said:

> I hold therefore, that as legislators we may constitutionally, properly, and wisely allow laborers to make associations, combinations, contracts, agreements for advancing their wages . . .[50]

And again, later, he added that there was a distinction "between the association of laborers and this class of cases at which this bill aims."[51] The opinion of Senator Hoar is important because he was a member of the Judiciary Committee which recast the bill. At any rate when the bill came back to the Senate from the Committee, the amendment was missing. It may have been that the Committee thought that the amendment was superfluous, that is, it was to be understood that the Act did not apply to

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[50] Ibid., 2728.

[51] Ibid., 2729.

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labor. But in leaving it out Congress left the matter to speculation.

The crux of the brief Act lay in Section 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

There were to be three methods of enforcement: (1) Criminal prosecution by the Government, (2) suits brought by injured private parties who could collect treble damages and costs, and (3) injunction proceedings initiated by the Government.

To all intents it appeared that Congress had passed a law aimed at curtailing the big business trusts. The courts decided that when one builds an umbrella to ward off the rain, there is nothing to prevent one from using it to ward off the rays of the sun as well. That epitomized the attitude of the courts towards the Sherman Anti-Trust Act.

CHAPTER VIII

THE FIRST LABOR INJUNCTION TO REACH THE SUPREME COURT

In 1880 George M. Pullman of sleeping-car fame established a company town on the outskirts of Chicago for his employees. Homes, stores, a theatre, a park, and even a church were "owned and operated by the Pullman Palace Car Company as a business investment."[1] During the depression in 1894 the company dismissed one third of its employees, and lowered the wages of the remainder from thirty to forty per cent. Rents and retail prices at the company houses and stores, however, were not reduced. This precipitated a strike. Some of the employees belonged to the American Railway Union which came to the aid of the strikers, and Eugene V. Debs, the head of the union, ordered its members to boycott all trains that included Pullman cars. The strike became widespread, and all rail traffic between Chicago and the west was practically halted.[2]

The situation got out of hand when hoodlums[3] began to participate in the strike; rioting, looting, and destruction of railway equipment ensued in and around Chicago. Over the protest of Governor Altgeld of Illinois, President Cleveland ordered federal troops into the

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[1] Hicks, op. cit., p. 262.

[2] Ibid., pp. 262-263.

[3] "Chicago saw rioting, much of it by hoodlums who stayed in Chicago after the 1893 Exposition." Carl Raushenbush and Emanuel Stein, Labor Cases and Materials, (New York: F. S. Crofts & Company, 1941), p. 64.

CHAPTER VIII

THE NIGHT RAIDS INAUGURATION BY ARMOUR THE SUPREME COURT

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[3] "Chicago was rioting, much of it by hoodlums who stayed in Chicago after the 1893 Exposition." Carl Haushalter, in Manual Skill, Labor Ideas and Industrial, New York: E. S. Gorrie & Company, 1941, p. 91.

area to protect free passage of the United States mail.[4]

In addition, the Government applied to the Federal District Court in Illinois and received the writ of injunction restraining "the said defendants, E. V. Debs, G. W. Howard, L. W. Rogers, Sylvester Keliher . . . and all persons combining and conspiring with them, and all other persons whomsoever absolutely to desist . . . from . . . in any manner interfering with the business of any of the following named railroads . . ."[5] The court relied on the Sherman Act to sustain the injunction.

Debs defied this order, and, in fact, on July 12, 1894, he urged a general strike.[6] He was charged with contempt because "the service of the injunction did not affect or change the policy or conduct of the defendants relative to said strikes, but that, on the contrary, the defendants continued . . . to direct the employés of the railway

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[4] As Governor Altgeld did not request the troops (the legislature was not in session) and as he did not want them, there was a question of constitutionality involved. Article IV, Section 4 of the Constitution reads: "The United States . . . shall protect each of them [the States] . . . on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence." However, Section 5298 of the Act of 1861 gave the President power to use troops when legal processes fell short, and later statutes gave him this right to enforce the decrees of federal courts. Berman, op. cit., p. 22. And the President certainly had a right to protect the mails if such was his intent in sending the troops. They carried out his intent in a strange way, however. "Having arrived there, they exerted themselves not merely to see that the mails were carried, but also to break the strike." Hicks, op. cit., p. 263.

[5] Excerpt from Debs Injunction reprinted in Frankfurter and Greene, op. cit., pp. 18-19.

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companies . . . to leave . . . in a body . . . "[7] Debs and his associates were convicted on December 14, 1894, and sentenced to six months imprisonment. The decision was appealed to the Supreme Court which unanimously sustained the injunction and the conviction in 1895.

The results of this case were as follows:

1. The labor injunction was possible under the Sherman Act. The lower courts relied upon this Act to sustain their decision. The Supreme Court relied on other grounds, but it did not repudiate the action of the lower courts.[8]

2. The labor injunction could be issued where a strike endangered government property--in this case the mails.[9]

3. The labor injunction could be used where a strike threatened the general welfare of the nation.[10]

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[7] U. S. v. Debs, 64 Fed. 724 (N. D. Ill., 1894). Excerpt cited in Frankfurter and Greene, op. cit., p. 19.

[8] "We enter into no examination of the Act of July 2, 1890 upon which the Circuit Court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the Act, but simply that we prefer to rest our judgment on . . . broader grounds . . . " Mr. Justice Brewer, In re Debs, Petitioner (158 U. S. 564, 1895), opinion reprinted in Raushenbush and Stein, op. cit., pp. 64-65.

[9] " . . . the United States have a property in the mails, the protection of which is one of the purposes of this bill." Excerpt from opinion cited in Powell, op. cit., p. 40.

[10] "The obligations which it [the government] is under to promote the interest of all and to prevent the wrong-doing of one resulting in injury to the general welfare is often of itself sufficient to give it a standing in court. * * * Yet, whenever the wrongs complained of are . . . in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties." Mr. Justice Brewer, In re Debs, Petitioner, from opinion reprinted in Sayre, op. cit., p. 143.

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4. The labor injunction could be exercised where a strike interfered with interstate commerce.[11]

5. It was the first important labor injunction containing the "blanket" clause.

6. It resulted in a conviction for contempt without the right of trial by jury.

The case was important because it promised to be a harbinger of future events. Certain rights seemed to be so inextricably confounded that in loosening one right another may have been bruised. In such a situation those rights must be salvaged which are paramount. A doctor will not hesitate to amputate the leg of a patient if it will save his life. And so in this case! The general welfare was at stake; there was interference with interstate commerce; and the mails were being obstructed. This state of affairs was harmful to the entire nation. If allowed to continue, anarchy and chaos could have ensued. The injunction averted that, but it also brought the strike to an end although it was not the avowed intention of the Supreme Court to accomplish the latter. "The right of any laborer, or any number of laborers, to quit work was not challenged. The scope and purpose of this bill was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried."[12] Thus to aid the whole, a small part suffered. This could not have been prevented any more than the

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first leg amputation could have been prevented. But as medical science eventually advanced to a point where in many cases both the patient and his limb were saved, so too was there the need to perfect the injunction to the point whereby it would protect the interests of the whole without harming the interests of the few. The Debs Case presented this poignant problem to the judiciary and legislative bodies to solve. This particular aspect of the case has not and is not currently easy of solution as evidenced in a similar case involving the general welfare in 1946-1947,[13] in which the Supreme Court could not in "good conscience" place the workers' right to strike above the general welfare. The peculiarity of such cases lies in the fact that they concern an entire industry and a strike or lockout may endanger the national health and safety. The Norris-LaGuardia Act of 1932 neglected this feature, but Sections 206 to 210 of the Taft-Hartley Act of 1947 prescribe a set procedure to be followed in such cases. This will be discussed in a later chapter.

The intricacy of the above problem met with little appreciation or sympathy on the part of Labor and its friends. To Labor the injunction and the action of the court appeared arbitrary. It began to fight what it called "government by injunction."[14] Had not the court acted as legislator, prosecutor, judge, and executioner! Had not labor leaders been

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[13] The United Mine Workers Case

[14] "The Democratic national platform for the presidential campaign of 1896 read as follows: 'We denounce arbitrary interference by Federal authorities in local affairs as a violation of the Constitution of the United States and a crime against free insitutions, and we especially object to government by injunction as a new and highly dangerous form of oppression by which Federal Judges, in contempt of the laws of the States and rights of citizens, become at once legislators, judges and

their leg amputation could have been prevented. But as medical science eventually advanced to a point where in many cases both the patient and his limb were saved, so too was there the need to perfect the injunction to the point whereby it would protect the interests of the whole without harming the interests of the few. The Hope Case presented this poignant problem to the judiciary and legislative bodies to solve. The particular aspect of the case has not and is not currently any of solution as evidenced in a similar case involving the general welfare in 1946-1947.[13] In which the Supreme Court could not in "good conscience" place the workers' right to strike above the general welfare. The peculiarity of such cases lies in the fact that they concern an unlike industry and a strike or lockout may endanger the national health and safety. The Norris-LaGuardia Act of 1932 neglected this feature, but Sections 200 to 210 of the Taft-Hartley Act of 1947 prescribe a set procedure to be followed in such cases. This will be discussed in a later chapter.

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silenced!.[15] The Court had justified these actions because of the aforementioned peculiarity of the Debs Case. Extraordinary measures were needed to curb the drastic activities of a few who were endangering the welfare of many. In view of these facts, it may have appeared at the time that labor's apprehension of the labor injunction was a bit unwarranted. All labor had to do was to eschew those practices that created a situation inimical to the general welfare. As far as obstruction of the mails or destruction of any government property was concerned, labor could easily govern its actions wisely by refraining from these acts. Endangering the public welfare and interfering with interstate commerce constituted a different matter. Here labor could endeavor to act wisely but ultimately it would lie with the discretion of the court as to what constituted endangering the public welfare and, especially, as when to

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[15] Debs described this curtailment of speech and action before the United States Strike Commission while awaiting appellate jurisdiction from the Supreme Court. " . . . Once we were taken from the scene of action, and restrained from sending telegrams or issuing orders or answering questions, * * * and we could not answer any messages. The men went back to work . . . " While the Supreme Court agreed with these facts (it went so far as to quote them: see opinion reprinted in Raushenbush and Stein, op. cit., p. 64.), its purpose was different from Debs'. Debs intimated that the strike had been crushed only by crushing certain constitutional freedoms; the Supreme Court, on the other hand, saw Debs abusing his rights rather than exercising them. It was this abuse that the Court sought to curtail. They saw Debs standing against law and order--against the majority with the public welfare in jeopardy. With Debs restrained, the danger passed. "The outcome [the end of the strike], by the very testimony of the defendants, attests the wisdom of the course pursued by the government, and that it was well not to oppose force simply by force, but to invoke the jurisdiction and judgment of those tribunals to whom by the Constitution and in accordance with the settled conviction of all citizens is committed the determination of questions of right and wrong between individuals, masses, and states." Ibid., p. 65.

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apply the Sherman Act.[16] It appears not to have been the intent of Congress to extend the application of the Act to labor controversies.[17] That this was not actually written into the Act made it possible for a literally minded court to interpret the Act as applying to labor disputes. The lower courts in the Debs Case had so interpreted it. The precedent had been set. Should the procedure and methods employed in the Debs Case be amplified and extended to cover all labor disputes, labor indeed had something to fear.

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[16] Acting wisely may be to no avail when the cards are stacked against labor as in the Pullman Strike. Labor certainly had no control over the lawless mobs; see supra , p. 53 , footnote 3 ; also Berman, op. cit., p. 18: " . . . a comparatively small number of those on strike were involved in lawless acts. The mobs were composed generally of hoodlums and recruits from the criminal classes." Moreover, the Government made an unwise decision in appointing Edwin Walker to prosecute its campaign against the strikers. In view of the fact that he was a railroad attorney (Ibid., pp. 29-30), his impartiality was open to question. In addition about 3,600 United States deputy marshals were selected and paid by the railroads. These acted as officers of the United States when actually they were employees of the railroads. "Many of them were worthless, men who were frequently reported drunk, who often exercised very poor judgment, and who were often arrested while on duty by the Chicago police for indiscriminate shooting and in several cases for highway robbery." Ibid., p. 31. Such was part of the story concerning the threat to the general welfare. And finally if the workers wanted to arbitrate rather than strike, they had no one to arbitrate with. The General Managers Association, representing the railroads, refused even to receive proposals (Ibid., p. 25); and President Cleveland did nothing to prevent the strike nor to settle it peacefully. Since he felt called upon to intervene, it is strange that "he delayed action until the strike and all its regrettable effects were upon the nation, and then he proceeded to end it in such a way that not only the wage earners of the country but many other citizens felt that the government had resigned a large share of its authority to the railroads for their unrestricted and arbitrary use in defeating the strikers." Ibid., p. 35.

[17] Supra, p 51 .

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17. Supra, p. 21.

In the next three decades the labor injunction began to be applied with increasing regularity. As it grew and expanded, it also unleashed those forces that sought to limit its powers and to purge it of abuses. It is in the study of these subsequent cases the will be found some of the seeds that led to corrective legislation.

CHAPTER IX

THE SUPREME COURT AND THE LABOR INJUNCTION PRIOR TO PASSAGE OF THE CLAYTON ACT

THE DANBURY HATTERS CASE[1]

In 1908 the application of the Sherman Act to labor disputes received its first big test. In Danbury, Connecticut, the Brotherhood of United Hatters of America struck against the firm of Loewe and Company, hat manufacturers, because the latter refused to accede to the demand for a closed shop. In addition, the union conducted a secondary boycott against the company's products.[2] The company claimed that it suffered a loss of about $88,000 as a result of this boycott and in 1903 sued for triple damages under Section 7 of the Sherman Act, alleging that the boycott was a conspiracy in restraint of its interstate commerce. The Circuit Court of Appeals dismissed the complaint in 1906, but when reviewed by the Supreme Court two years later, the decision was reversed.[3] The union was assessed $232,00--triple damages and costs. After several unsuccessful attempts to have the decision reversed, the defendants finally paid the sum of $234,000.[4]

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[1] Loewe v. Lawlor, 208 U. S. 274 (1908).

[2] A general description of a secondary boycott is the refusal of A to deal with B if B deals with C.

[3] The Court unanimously decided that "the combination described in the declaration was a combination in restraint of trade and commerce among the several states, in the sense in which those words are used in the [Sherman] Act, and the action must be maintained accordingly." Reprinted in Mounce, op. cit., p. 113.

[4] Ibid., pp. 112-113

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Although this case did not involve the labor injunction, it is pertinent because the Supreme Court definitely stated that the Sherman Act applied to labor and that secondary boycotts were rendered illegal by the Act in so far as they interfered with interstate commerce. In the future, then, infringements of the Act such as secondary boycotts could conceivably be restrained by injunction.[5] Within a few years this came about in Gompers v. Bucks Stove & Range Company.[6]

GOMPERS v. BUCKS STOVE AND RANGE COMPANY[7]

This was the next labor injunction case to come before the Supreme Court. Although the Court reversed a conviction for contempt because of certain technicalities and because the parties had already settled their differences out of court, its opinion bears discussion because it throws light on the attitude the Court had taken in regard to the labor injunction. The Court, in effect, crystallized certain judicial conceptions, and future litigants were implicitly forewarned to conduct themselves accordingly.

A dispute over hours of work precipitated a boycott by the union against the products of the Bucks Stove & Range Company. The company was declared "Unfair" and placed on the "Unfair" and "We don't patronize"

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[6] "The most definite exposition of the Sherman Law was made in the Gompers Case . . . " Frankfurter and Greene, op. cit., p. 9.

[7] Gompers v. Bucks Stove & Range Company, 221 U. S. 418 (1911).

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lists of the American Federationist, an organ of the American Federation of Labor. The company filed a complaint with the Supreme Court of the District of Columbia, alleging that the union had entered into a conspiracy to interfere with its interstate commerce and had used the boycott to accomplish this purpose. Through unfair lists and threats, merchants had been prevented from dealing with the Bucks Company lest they themselves be boycotted. This resulted in persons severing their relations with the company and, consequently, a loss of business and irreparable damage. After a hearing, the court granted a temporary injunction,[8] effective December 23, 1907. On March 23, 1908, a permanent injunction replaced the temporary one. A few months later the complainants filed contempt proceedings against the defendants, alleging that the injunction had not been obeyed and that through speeches and printed matter the boycott was, in effect, still being continued. The defendants denied that they were in contempt and that their statements violated the injunction; and they asserted that if their statements violated the injunction, then the

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[8] The temporary injunction read in part: "Ordered that the American Federation of Labor, Samuel Gompers, Frank Morrison, . . . John Mitchell . . . and all persons acting in aid of or in conjunction with them be . . . restrained and enjoined . . . from conspiring, agreeing, or combining in any manner to restrain, obstruct or destroy the business of the complainant * * * and from declaring or threatening any boycott against the complainant . . . or the product of its factory, or against any person . . . engaged in handling or selling the said product . . . and from printing, issuing, publishing, or distributing through the mails, or in any other manner, any copies or copy of the American Federationist, or any other printed or written newspaper . . . or instrument whatsoever, which shall contain or in any manner refer to the name of the complainant . . . in the 'We don't patronize', or the 'Unfair' list of the defendants * * * or words of similar import, and from publishing . . . whether in writing or orally, any statement . . . calling attention . . . to any boycott against the complainant, its business or its product, or that the same are, or were, or have been declared to be 'unfair' . . . ", from the order, reproduced in the report covering Gompers v. Bucks Stove & Range Company, 221 U. S. 418 at pp. 420-422.

lists of the American Federationist, an organ of the American Federation of Labor. The company filed a complaint with the Supreme Court of the District of Columbia, alleging that the union had entered into a conspiracy to interfere with its interstate commerce and had used the boycott to accomplish this purpose. Through unfair lists and threats, merchants had been prevented from dealing with the Buck's Company lest they themselves be boycotted. This resulted in persons severing their relations with the company and, consequently, a loss of business and irreparable damage. After a hearing, the court granted a temporary injunction,[8] effective December 23, 1907. On March 23, 1908, a permanent injunction replaced the temporary one. A few months later the complainants filed contempt proceedings against the defendants, alleging that the injunction had not been obeyed and that through speeches and printed matter the boycott was, in effect, still being continued. The defendants claimed that they were in contempt and that their statements violated the injunction, and they asserted that if their statements violated the injunction, then the

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[8] The temporary injunction read in part: "Ordered that the American Federation of Labor, Samuel Gompers, Frank Morrison, . . . John Mitchell . . . and all persons acting in aid of or in conjunction with them be . . . restrained and enjoined . . . from conspiring, agreeing, or combining in any manner to restrain, obstruct or destroy the business of the complainant * * * and from declaring or threatening any boycott against the complainant . . . or the product of its factory, or against any person . . . engaged in handling or selling the said product . . . and from printing, issuing, publishing, or distributing through the mails, or in any other manner, any copies or copy of the American Federationist, or any other printed or written newspaper . . . or instrument whatsoever, which shall contain or in any manner refer to the name of the complainant . . . in the 'We don't patronize', or the 'Unfair' list of the defendants * * * or words of similar import, and from publishing . . . whether in writing or orally, any statement . . . calling attention . . . to any boycott against the complainant, its business or its product, or that the same are, or were, or have been declared to be 'unfair' . . . ". From the order, reproduced in the report covering Gompers v. Buck's Stove & Range Company, 221 U. S. 418 at pp. 420-422.

injunction was a nullity for it sought to abridge freedom of speech and of the press. In that case they could not be held in contempt for having disobeyed it.[9]

On December 23, 1908, the defendants were found guilty and given assorted jail sentences. Gompers received the maximum one, being sentenced to one year in prison. The defendants immediately appealed as they had when the injunction was first issued. Meanwhile the parties had settled their differences, so that the original appeal by the union and a cross appeal by the Company were dismissed by the Court. The matter of the conviction remained, however, and this came to the Supreme Court on appeal from the defendants in 1911. Justice Lamar delivered the opinion of the Court. The conviction for contempt was reversed on technical grounds. The Court pointed out the difference between criminal contempt and civil contempt. The character and purpose of a case distinguishes between the two. In civil contempt "the punishment is remedial, and for the benefit of the complainant," whereas in criminal contempt "the sentence is punitive, to vindicate the authority of the Court."[10] It can happen in a civil contempt

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[9] This was for sake of argument, for the defendants claimed that they did not disobey the order. Later, when appealing to the Supreme Court, the defense (now the petitioner), in seeking to set aside the contempt conviction, argued: " . . . these defendants did not offend against either the letter or spirit of the decree. It is true that the name of Bucks Stove & Range Company did appear in the 'We don't patronize' list of the American Federationist after the order was made forbidding it. But it also appears that this was before the date when the order became effective by its very terms. Certainly the defendants cannot be held to have violated the order before it became operative." Argument for the Petitioner, Gompers v. Bucks Stove & Range Company, 221 U. S. 418 at p. 430.

[10] Ibid., at p. 441.

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[10] Ibid., at p. 441.

case that the defendant is imprisoned; but the incarceration is not intended to punish the defendant but rather to coerce him to perform a certain remedial action. He willbe freed as soon as he does what he was ordered to do. (For example, if the defendant refuses to comply with a mandatory injunction,[11] he can be imprisoned until he acquiesces to the court's order.) If the defendant is ordered not to do a certain act,[12] and he disobeys, imprisonment in a civil case would not be of remedial benefit to the complainant but would be solely to punish the defendant. This would defeat the purpose of civil contempt. In the case under discussion, the defendants had been found guilty of disobeying a preventive injunction. The punishment, however, had been punative rather than remedial. The complainant did not receive material benefit from that decree. If that had been the intent of the lower court, then this should have been a criminal contempt case. But the proceedings were not conducted in the prescribed manner but according to the rules of equity. "Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the same cause. But on the other hand, proceedings at law for ciminal contempt are between the public and the defendant, and are not a part of the original case."[13] The Court pointed out that it was not the Government that had instituted proceedingsagainst the defendants, but a private party, the Bucks Stove & Range Company.[14] The Court concluded that this was clearly a case of civil contempt calling forth for only remedial relief and it set aside the conviction of the defendants. Furthermore, as the parties had

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[11] Supra, p. 19.

[12] Preventive Injunction, see supra, p. 19.

[13] Ibid., p. 445.

[14] "In the first place the petition was not entitled "United States v.

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[11] Supra, p. 12.

[12] Preventive Injunction, see supra, p. 12.

[13] Ibid., p. 446.

[14] In the first place the petition was not entitled "United States v.

already settled their differences out of court, thus terminating the main cause, the complainants were no longer entitled to remedial relief.[15]

The implications of this part of the opinion are clear. To begin with, the employers were indirectly advised as to the procedure to follow in contempt cases. In the future, they would be careful to specifically pray for remedial relief in contempt cases. In view of the fact that this right to remedial relief would be prejudiced by a private agreement, it would behoove the employer not to reach such an agreement with its employees in a labor dispute where injunction proceedings had already been instituted. This aspect of the injunction procedure could very well arrest future negotiations between employees and employers and place greater reliance upon the courts to decide the whys and wherefores of a labor dispute.

In discussing punishment for contempt, the Court revealed how efficacious an injunction could be. Once issued there remained nothing to do but to obey it. Criminal contempt could bring a punitive sentence; civil contempt would mean remedial reparations which could make serious inroads into a union's treasury. In addition, civil contempt of a mandatory injunction would mean imprisonment until the guilty party was ready to do as the court directed. A permanent blanket injunction could really paralyse the actions of labor in an industrial dispute. The only alternative would be to appeal the injunction and await the results of lengthy and costly litigation.

Samuel Gompers, et al. . . . as would have been proper . . . if the proceedings had been at law for criminal contempt." Ibid., p. 446.

[15] If this had been a case of criminal contempt, the fact that the parties concerned settled their differences out of court would not have prevented the court from vindicating its authority. Ibid., p. 451.

What the Court had to say about the injunction made it clear to labor that it would have to revise its notions concerning freedom of speech, the boycott and the Sherman Act, and to govern itself accordingly in the future. This, the more important part of the opinion, was pregnant with these results:

1. Free speech was not abridged by a court order restraining a boycott against the complainant when the boycott was carried on by publishing that the complainant was unfair. Such an injunction did not abridge free speech; freedom of speech wasn't even involved. It was the objective of the Court to stop a boycott which "caused or threatened irreparable damage."[16]

2. While the courts may differ as to the type of boycott that may be enjoined, all agree "that there must be a conspiracy causing irreparable damage to the business[17] or property of the complainant."

3. Again referring to the question of freedom of expression, the Court pointed out that once a court adjudged a boycott illegal, the means by which the boycott was unlawfully continued would also per se be in violation of the injunction enjoining the boycott.[18] Among others,

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[16] The Court was alluding to the fact that there is no abridgment of free speech involved where "free speech" is being abused to the extend that it is detrimental to others. This idea was expressed succintly by Mr. Justice Holmes in his opinion in Aikens v. Wisconsin, 195 U. S. 194 (1904): "No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent an constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

[17] Italics supplied; what the court meant was that the employer's right to do business is a property right to be protected as property. Frankfurter and Greene refer to the case as an example of this point of law., op. cit., p. 47.

[18] By means the Court meant "the publication and use of letters,

What the Court had to say about the injunction made it clear to labor that it would have to revise its notions concerning freedom of speech, the boycott and the Sherman Act, and to govern itself accordingly in the future. Thus, the more important part of the opinion was concerned with these results:

1. Free speech was not abridged by a court order restraining a boycott against the complainant when the boycott was carried on by publishing that the complainant was unfair. Such an injunction did not abridge free speech; freedom of speech rarely even involved. It was the objective of the Court to stop a course which "caused an irreparable damage."[16]

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[18] By means the Court meant "the publication and use of a device,

the Court cited Sherry v. Perkins as an authority.[19]

4. The Sherman Act applies wherever interstate commerce is restrained; even if this is accomplished by combinations of labor. If interstate commerce is being restrained by a boycott involving speech and publications, it would render the law a nullity to say that the law must be enforced but that the means by which it was being broken could not be enjoined.[20] The Court cited Loewe v. Lawlor.

5. Although labor unions are legal, they are in a position to exercise extraordinary power, and it is the duty of the Government to see that this power is not abused. It must protect the one against the many as well as the many against the one.

6. And finally the Court felt that it could not leave this question of free speech without making a further comment. Where there is an unlawful conspiracy, words that are a signal for concerted action exceed "any possible right of speech which a single individual might have." The Court called these "verbal acts" which are as lethal as force in causing unlawful damage to property. As such, they could be enjoined.

In Chapter VII, following the case of Springhead Spinning Co. v. Riley, some pertinent questions were poised,[21] the answers to which are

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circulars and printed matter . . . whereby a boycott is unlawfully continued. . . ." Gompers v. Bucks Stove & Range Co., 221 U. S. 418.

[19] Thus the importance of this early case; see supra, p. 46.

[20] " . . . whether these [means] be made effective, in whole or in part, by acts, words or printed matter. . . To hold that the restraint of trade under the Sherman Anti-trust Act . . . could be enjoined, but that the means through which the restraint was acomplished could not be enjoined would be to render the law impotent." Gompers v. Bucks Stove & Range Co., 221 U.S. 418.

[21] Supra, p. 45.

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now becoming discernable at this point. Property is the right to do business, and all that that involves including selling and hiring. To interfere with this right is coercion and intimidation leading to irreparable damage to property. Such actions can be enjoined even if they involve speech and printed matter, if the purpose be unlawful. In addition something new was added--the Sherman Act.[22]

PAINE LUMBER CO. v. NEAL[23]

The Paine Lumber Company Case began its tortuous journey through the courts in February 1911. The defendant unions, who were not employees of the plaintiff, refused to work on his material because the plaintiff employed non-union labor. To enjoin this action, the Paine Lumber Company obtained a temporary restraining order on the aforementioned date, and, later, a temporary injunction. The bill was dismissed, however, in November 1913, and the dismissal was affirmed by the Circuit Court of Appeals in April 1914. On June 11, 1917, the Supreme Court handed down its decision with three Justices dissenting. The question before the Court was whether the Sherman Act authorized an injured private party to enjoin a boycott in restraint of its interstate commerce. The majority opinion held that the Paine Lumber Company was not entitled to equitable

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[22] Such was the opinion of the Court in the Gompers Case. But public opinion is also important, for presumably it will sooner or later be reflected in the courts. A segment of the public expressed an opinion in the Gompers Case and it was different from that of the courts. "The publicity in this case was so unfavorable to the company, that its sales continued to decline after the injunction. Within three years the company, under new management, made its peace with the union." Lester, op. cit., p. 709.

[23] 244 U. S. 459 (1917). Material and excerpts from this case were obtained from Frankfurter and Greene, op. cit., pp. 145, 166, and 241, and from Powell, op. cit., pp. 42-44.

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[23] 241 U. S. 429 (1917). Material and excerpts from this case were obtained from Frankfurter and Greene, op. cit., pp. 185, 189, and 214, and from Powell, op. cit., pp. 43-44.

relief because private persons could not institute injunction proceedings under the Sherman Law which gave this right only to the government. Furthermore, as litigation had commenced prior to passage of the Clayton Act of 1914, which did grant the right of injunction to private parties, that Act did not apply. That is, the law in force at the time the case arose, should rule. Mr. Justice Holmes, writing the majority opinion, injected a personal view when he said that the Clayton Act "established a policy inconsistent with the granting" of an injunction "here." In other words, he felt that in any case the Clayton Act would not apply. He admitted that on this point he was in the minority.

The minority opinion written by Justice Pitney contented that the Sherman Act did not prevent the complainant from seeking an injunction. He wrote that:

> . . . in the absence of some provision to the contrary, the right to relief by injunction, where irreparable injury is threatened through a violation of property rights, and there is no adequate remedy at law, rests upon settled principles of equity that were recognized in the consitutional grant of jurisdiction to the courts of the United States.[24]

The minority also held that it could find nothing in Section 20 of the Clayton Act which interfered "with the right of the complainants to an injunction." That part of the minority opinion was important, for it was a precursor of the interpretation the Court was to put upon the Clayton Act in subsequent cases. Even the majority, excluding Mr. Justice Holmes, intimated that the Act would have authorized an injunction if the case in question had post-dated the Clayton Act. It would appear from

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The minority opinion written by Justice Pitney contended that the Sherman Act did not prevent the complainant from seeking an injunction. He wrote that:

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this case that boycotts could be enjoined under the Clayton Act, and this construction definitely came to fruition in 1921 in Duplex Co. v. Deering. In the meanwhile one more significant case, which bears discussion, came before the Court--the Hitchman Coal Company Case.

HITCHMAN COAL & COKE COMPANY v. MITCHELL[25]

The Hitchman Company incorporated in the state of West Virginia and operated a mine in the Panhandle district of that state. After many disputes with the United Mine Workers of America, who represented the Hitchman miners, the company began to operate on a non-union basis. Before taking back men who had been on strike, the company stipulated that each employee agree not to join the United Mine Workers and that the employees recognize that the mine was to be operated on a non-union basis as a condition of employment. That is, each man was given to understand that while he was an employee of the company, he would not join the union. To this verbal "iron clad"[26] contract, the men agreed and later signed a written one which read:

> I am employed by and work for the Hitchman Coal & Coke Company with the express understanding that I am not a member of the United Mine Workers of America, and will not become so while an employé of the Hitchman Coal & Coke Company; that the Hitchman Coal & Coke Company is run non-union and agrees with me that it will run non-union while I am in its employ. If at any time I

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[25] Case reported and reprinted in Handler, op. cit., pp. 219-230, sans minority opinion, however; dissenting opinion of Brandeis is reported in Raushenbush and Stein, op. cit., pp. 105-108.

[26] Also called a "yellow-dog" contract which Handler defines as: "A contract of employment providing that the employee will not become or remain a member of any labor organization during the period of his employment, or that he will quit his employment if he becomes a member of a labor organization." Handler, op. cit., p. 28.

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HITCHMAN COAL & COKE COMPANY v. MITCHELL[25]

The Hitchman Company incorporated in the state of West Virginia and operated a mine in the Fairmont district of that state. After many disputes with the United Mine Workers of America, who represented the Hitchman miners, the company began to operate on a non-union basis. Before hiring back men who had been on strike, the company stipulated that each employee agree not to join the United Mine Workers and that the employees recognize that the mine was to be operated on a non-union basis as a condition of employment. That is, each man was given to understand that while he was an employee of the company, he would not join the union. To this verbal "iron clad"[26] contract, the men agreed and later signed a written one which read:

> I am employed by and work for the Hitchman Coal & Coke Company with the express understanding that I am not a member of the United Mine Workers of America, and will not become so while an employee of the Hitchman Coal & Coke Company; that the Hitchman Coal & Coke Company is run non-union and agrees with me that it will run non-union while I am in its employ. If at any time I

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[25] Cases reported and reprinted in Bunzel, op. cit., pp. 219-229; cases already operation, however; diametrically opposite of Brandeis is represented in Frankenheim and Shaln, op. cit., pp. 105-10.

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> am employed by the Hitchman Coal and Coke Company I want to become connected with the United Mine Workers of America or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company I will not make any efforts amongst its employes to bring about the unionizing of that mine against the company's wish. I have either read the above or heard the same read.[27]

Almost all of the mines in the Panhandle district were operated on this non-union basis, and they competed with mines in Ohio, Indiana, Illinois, and part of Pennsylvania which were organized by the United Mine Workers. This condition in West Virginia constituted a direct threat to the union in the organized areas.[28] The court itself later phrased the situation thus:

> The unorganized condition of the mines in the Panhandle and some other districts was recognized as a serious interference with the purposes of the union in the Central Competitive Field, particularly as it tended to keep the cost of production low, and, through competition with coal produced in the organized field, rendered it more difficult for the operators there to maintain prices high enough to induce them to grant certain concessions demanded by the union.[29]

To remove this threat to union security in which unorganized mines competed with union mines, the United Mine Workers launched a vigorous organizing campaign in the West Virginia coal fields paying particular attention to the Hitchman Company. At the Hitchman mine,

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[27] Ibid., p. 222.

[28] This "was a fatal thrust at the continuance of union conditions in the organized areas." Frankfurter and Greene, op. cit., p. 38.

[29] Handler, op. cit., p. 223.

> an employed by the Kitchen Coal and Coke Company I want to become connected with the United Mine Workers of America or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company I will not make any efforts amongst its employes to bring about the unionizing of that mine against the company's wish. I have either read the above or heard the same read.[27]

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[29] Ramsler, op. cit., p. 222.

organizers got pledges from about sixty men agreeing to join the union and to strike when called upon.

On October 24, 1907, the Hitchman Company prayed for and received injunctive relief against the union. In the bill, the complainant asserted that the defendants were aware of the agreement between the company and its employees that the mine should be run on a non-union basis, but in spite of this, the defendants conspired to induce the miners to break the contract by joining the union and by striking at the appropriate time for a "closed shop." The Supreme Court later summarized the object and the cause of the injunction thus:

> The general object of the bill was to obtain an injunction to restrain defendants from interfering with the relations existing between plaintiff and its employes in order to compel plaintiff to 'unionize' the mine . . .[30]
>
> In short, at the time the bill was filed, defendants, although having full notice of the terms of employment existing between plaintiff and its miners, were engaged in an earnest effort to subvert those relations without plaintiff's consent, and to alienate a sufficient number of the men to shut down the mine, to the end that the fear of losses through stoppage of operations might coerce plaintiff into 'recognizing the union' at the cost of its own independence. The methods resorted to by their 'organizer' were such as have been described. The legal consequences remain for discussion. . .[31]

The ex parte restraining order issued on October 24, 1907,

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[30] Ibid., p. 220.

[31] Ibid., p. 225.

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> In short, at the time the bill was filed, defendants, although having full notice of the terms of employment existing between plaintiff and its miners, were engaged in an earnest effort to subvert those relations without plaintiff's consent, and to alienate a sufficient number of the men to shut down the mine, to the end that the fear of losses through stoppage of operations might coerce plaintiff into 'recognizing the union' at the cost of its own independence. The methods resorted to by their 'organizers' were such as have been described. The legal consequences remain for discussion. . . .[31]

The ex parte restraining order issued on October 24, 1907.

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[30] Ibid., p. 220.

[31] Ibid., p. 225.

became a temporary injunction on May 26, 1908, and a permanent injunction was granted on December 23, 1912. In 1914 the Circuit Court of Appeals reversed the decree of the lower courts and dismissed the bill but stayed action pending resort to the Supreme Court. In 1917, ten years after the case had first appeared in the courts, the Supreme Court handed down its decision with three Justices dissenting.[32] The majority opinion written by Justice Pitney arrived at these conclusions:

Was the plaintiff within its lawful rights in imposing an anti-union contract upon his employees as a condition of employment? The Court held that it was. "This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union . . ."[33] The Court pointed out that as the right to join a union must be protected so must the right not to deal with a union be protected. Men cannot be coerced into collective bargaining. "Whatever may be the advantage of 'collective bargaining', it is not bargaining at all, in any just sense, unless it is voluntary on both sides."[34]

May an employer look upon the continuing employment of his workers as a property right? The Court held that he could. This did not mean that the employees were not free to leave their jobs if they wished, but a third person had no lawful right to persuade them to do so. The court phrased it thus: ". . . plaintiff was and is entitled to the good

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[33] Handler, loc. cit.

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will of its employés . . . although they are under no obligation to deal with him. * * * it will be able to retain them in its employ. * * * The right of action for persuading an employé to leave his employer is universally recognized."[35]

The defendants contended that since the measures they adopted to unionize the Hitchman mine were peaceable, they were also lawful. The Court replied that any measures that violated the plaintiff's legal rights were as illegal as if they had involved a breach of the peace. "A combination to procure concerted breaches of contract by plaintiff's employés constitutes such a violation."[36]

The Court made it clear that it was not abridging the union's right to proselytize among unorganized workers. The union could have accepted members from the Hitchman mine, provided they terminated their employment as provided in the contract made with the plaintiff. The union knowing of this contract, moreover, permitted the new members to remain at the mine with the intention of striking when the number should be large enough to injure the plaintiff. The decision was based mainly upon this point, for injury to the plaintiff could not result if the miners, acting in line with the contract, had resigned their jobs as they joined the union. It would have been easy for the plaintiff to replace his workers a few at the time as they left, but very difficult if the major part of his labor was withdrawn all at the same time as the union intended.

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[35] Ibid., pp. 225-226.

[36] Ibid., p. 228.

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To summarize: The Court held that the anti-union contract was lawful and that "the damage resulting from a strike would be irremediable."[37] Hence the injunction was granted.

The dissenting opinion is important because it views some of the facts differently and because much of it was later to be incorporated into legislation. Justice Brandeis pointed out that no evidence had been introduced to prove a conspiracy to either shut down or injure the mine; furthermore, there was no evidence of "threats, violence, or intimidation." Then he discussed the overall issues involved. Was the mine organized without the plaintiff's consent? To unionize a shop means more than persuading the workers to join the union; it also means inducing the employer to recognize the union for collective bargaining purposes. "Unionizing implies, therefore, at least formal consent of the employer."[38] In this case the plaintiff sought to operate a "closed non-union shop," while the defendants wanted a "closed union shop." The latter objective could be secured only through collective bargaining which is legal. "The end being lawful, defendant's efforts to unionize the mine can be illegal only if the methods or means pursued were unlawful."[39]

Justice Brandeis enumerated the chief features of unionizing as follows: (1) The closed shop, (2) collective bargaining with the union officers to negotiate wage scales and hours of work, and (3) taking up grievances with representatives of the union. He called these legal ends which workers could lawfully obtain and, if need be, secure through strikes. In that event, why could not the union strike "or use equivalent economic

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pressure to secure an agreement to provide them?"[40]

But is not this plan to induce the employees to join the union and then to strike to secure the employer's consent coercion? Justice Brandeis held that it was not. The employer was free to accept or reject the unionization of his shop including the disadvantage of a strike if he refused. In fact, the employer's proposal to the employees was based on similar grounds. That is, the employees were free to accept or reject the employer's agreement not to join the union along with the disadvantage of unemployment if they refused. "The employer may sign the union agreement for fear that labor may not be otherwise obtainable; the workman may sign the individual agreement for fear that employment may not be otherwise obtainable. But such fear does not imply coercion in a legal sense."[41] Justice Brandeis contended that a non-union closed shop obtained via a yellow dog contract and a closed shop secured through a strike were both legal. "In a legal sense an agreement entered into, under such circumstances, is voluntarily entered into; and as the agreement is in itself legal, no reason appears why the general rule that a legal end may be pursued by legal means should not be applied."[42]

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[42] Loc. cit. This seems to be in answer to the majority's assertion that "Whatever may be the advantages of 'collective bargaining', it is not bargaining at all, in any just sense unless it is voluntary on both sides." This implied of course that collective bargaining could not be secured by striking. Yet the majority opinion sanctioned the anti-union contract which was secured by withholding employment. This was inconsistent. Justice Brandeis, at least, was consistent; he held that a closed shop secured by a strike was a legal end secured by legal means; and he likewise upheld the legality of a non-union closed shop secured by withholding employment.

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Justice Brandeis did not think the anti-union contract had been violated. The contract did not prevent the miners from joining the union; it merely stipulated that they could not join the union and continue working for the Hitchman Company. The union had not signed up the miners as members, but had merely received pledges from some of them that they would join the union. The contract would have been violated only when the miners joined the union and continued on their jobs. There was no evidence that this had happened or was contemplated. If the intention of the union was to secure a large number of pledges who would join and strike at the propitious moment, this would have been permissible under the contract.

Finally Justice Brandeis, in answer to the majority opinion's assertion that "the right of action for persuading an employé to leave his employer is universally recognized,"[43] replied that this is so only if it be done "maliciously and without justifiable cause."[44] To strengthen the union and the bargaining power of the individual through collective bargaining was in the opinion of the minority a justifiable purpose.

The legal interpretation of the facts as expounded by the opposing opinions need no further comment for they have been eloquently argued by Justices Pitney and Brandeis respectively for the majority and the minority. It would be well, however, to recapitulate briefly the results of this case. The yellow dog contract was held to be legal; even

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[43] Supra, p. 75.

[44] Raushenbush and Stein, op. cit., 107.

the minority did not contest this point. The minority insisted, however, that unionization and all that it implied was a legal end that could be pursued by legal means, viz., economic pressure such as a strike, provided "threats, violence, or intimidation" were not used. This philosophy was important because traces of it were later incorporated in the Norris-LaGuardia and National Labor Relations Acts.[45] It seems strange, however, that the minority did not find this right to join the union incompatable with the yellow-dog contract.

If the Hitchman decision were to be strictly interpreted, an employer by refusing to bargain collectively would be immune from unionization. Yet within the next few years union membership experienced a phenomenal growth. Part of the answer to this lay in World War I and the policy of the National War Labor Board. To achieve national solidarity and uninterrupted production, the Board ruled that men were not to be fired for union membership. This practically abrogated the Hitchman decision for the duration of the war. The end of the war and the disappearance of the Board saw the launching of an anti-union campaign and a multiplication of yellow-dog contracts especially in the coal fields.[46] National solidarity and uninterrupted production apparently

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[45] Section 2 of the Norris-LaGuardia Act, which deals with the public policy of the United States, infra, Appendix I; Section 1 of the National Labor Relations Act encourages collective bargaining by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

[46] After the war the United Mine Workers began to organize the non-union area of West Virginia in the face of the many yellow-dog contracts that abounded in that area. The operators sought to restrain this invasion of unionism, and the many injunction suits that resulted were consolidated under the title, International Organization, United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Company, 18 F.

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[16] Attorney Gen. Mitchell Palmer had ordered U.S. Marshals to arrange the non-union area of West Virginia in the face of the yellow-dog contracts that abounded in that area. The operators sought to prevent the invasion of unions, and the Jan. 1922 injunction, which certified were consolidated under the title, International Organization, United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Company, 18 F.

were not desirable during years of peace!

2d 839 (C. C. A. 4 1927), certiorari denied 275 U. S. 536, (1927). A temporary injunction was granted in 1920, and it was made permanent in 1925. The appeal of the defendant union was turned down in 1927 by Judge Parker of the Circuit Court of Appeals. In his opinion Judge Parker cited the Hitchman Case in support of the decision, and he said in part: "To approach a company's employees, working under a contract not to join the union while remaining in the company's service, and induce them, in violation of their contracts, to join the union and go on a strike for the purpose of forcing the company to recognize the union or of impairing its power of production, is another and very different thing. What the decree forbids is this 'inciting, inducing, or persuading the employees of plaintiff to break their contracts of employment'; and what was said in the Hitchman Case with respect to this matter is conclusive of the point involved here." It is interesting to note that Judge Parker's nomination to the Supreme Court in 1930 was rejected by the Senate largely because of his enforcement of the yellow-dog contract. An examination of the Congressional Record for May 7, 1930, Volume 72, 8475 to 8488, reveals a Senatorial reaction against the injunction and the yellow-dog contract. It must be added, however, that Judge Parker's alleged anti-negro views also contributed to his rejection.

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CHAPTER X

THE CLAYTON ACT

Under pressure from labor organizations many attempts had been made in Congress to remove labor from the jurisdiction of the Sherman Act and to offer labor some relief from the injunction. There was no great opposition against legislative proposals to curb equity jurisdiction. The Littlefield anti-trust bill of 1900, which contained an amendment excluding labor from the anti-trust provisions, was passed by the House but became buried in the Senate Judiciary Committee.[1] The Pearre Bill of 1907 and the Wilson Bill of 1911, both affording equity reform, were never enacted. The procedure was not to reject but to refer back to committee, to amend and emasculate, and to delay. Though these direct attempts at reform did not come to fruition, an indirect approach finally met with approval.[2] After 1913, appropriation bills carried a provision which stipulated that none of the funds were to be employed in prosecuting labor organizations under the anti-trust acts.[3] This devious and questionable attempt[4] at reform best exemplifies the attitude of Congress which was to remain non-committal. Thus the appearance was

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[1] Frankfurter and Greene, op. cit., p. 140.

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other hand, the Act led the President of the American Bar Association to say:

> All these provisions have been called the charter of liberty of labor. We have seen that the changes from existing law they make are not broadly radical and that most of them are declaratory merely of what would be law without the statute. This is a useful statute in definitely regulating procedure in injunctions and in express definition of what may be done in labor disputes. But what I fear is that when the statute is construed by the courts it will keep the promise of the labor leaders to the ear and break it to the hope of the ranks of labor.[8]

How could these diametrically opposed interpretations be explained? To seek the intent of Congress would be futile for the "debates in Congress looked both ways."[9] Why had not Congress been more explicit? The election of a liberal president had no doubt facilitated passage of the Act; but Wilson was a minority president.[10] In view of that fact Congress may not have deemed it feasible to be too

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[8] Ibid., p. 164.

[9] Ibid., p. 143. Some of the members of the Judiciary Committee felt that Section 6 of the Act removed labor from the provisions of the Sherman Law; others "suggested that the act would merely prevent suits for the dissolution of labor organizations, but would continue to permit the issue of injunctions under the Sherman Law to restrain them from carrying out their purpose." Ibid., p. 144. It is amazing to note that some of those who supported the Act (Senator Pittman for one) assured Congress that it was not a radical departure from what was already law; while those who opposed it, feared that the Act would immunize labor from the anti-trust laws. Many of the Congressmen were at least candid; they "attacked the legislation as futile if it aimed only at legislation of what was already legal, and vicious if it accomplished the immunization of labor from the anti-trust laws." Loc. cit.

[10] Theodore Roosevelt contributed to the defeat of Taft by running on a third party ticket. The combined popular vote of Roosevelt and Taft, however, amounted to 7,609,942, as against 6,286,216 votes for Wilson. Debs running on the socialist ticket received 897,000 votes. Thus Wilson

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zealous in its reform--and thus it presented labor with a half-way measure leaving it up to the "Supreme Court . . . to find meaning where Congress had done its best to conceal meaning."[11] In several landmark decisions the Supreme Court found nothing in the Act that changed the status of labor under equity jurisprudence, but that on the contrary, the Act merely crystallized into statute the law that had already developed in the courts of equity. One may well ask what was the point of passing the labor sections of the Act if such was the case.[12] Could this statute which "was the fruit of unceasing agitation, which extended over more than twenty years . . . "[13] offer no injunctive relief to labor? The Supreme Court decided that it did not. The argument as to which of the two--Congress or the Supreme Court--failed labor has long since raged.[14]

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was certainly not the choice of the majority of the voters, but in the electoral college he received 435 votes as against 88 for Roosevelt and 8 for Taft.

[11] Frankfurter and Greene, op. cit., p. 145

[12] Mr. Justice Brandeis raised this point in Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921). Case reprinted in Handler, op. cit., pp. 259-270.

[13] Mr. Justice Brandeis, ibid., p. 268. Frankfurter and Greene also point out that the " . . . Clayton Act was the product of twenty years of voluminous agitation." Frankfurter and Greene, op. cit., p. 176.

[14] "It is hard to read this important chapter in the development of American labor policy without becoming disillusioned about two of our most important branches of government--Congress and the Supreme Court. Ever since [the] first interpretation of Section 20 of the Clayton Act, almost all educated opinion in this country has been that the Supreme Court sold organized labor down the river when it construed this section. But there is another angle to this. Several astute lawyers thought that Congress was the body which had betrayed the labor unions when it enacted Section 20. They believed that Congress deliberately made this section ambiguous * * * . These same lawyers thought that Congress had all the time actually hoped and believed that the Supreme Court would nullify by construction the liberal implications of the section." Gregory, op. cit., p. 170.

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11 Frankfurter and Greene, op. cit., p. 185

12 Mr. Justice Brandeis raised this point in Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921). Case reprinted in Hamlin, op. cit., pp. 252-270.

13 Mr. Justice Brandeis, ibid., p. 208. Frankfurter and Greene also point out that the " . . . Clayton Act was the product of twenty years of voluminous agitation." Frankfurter and Greene, op. cit., p. 175.

14 "It is hard to read this important chapter in the development of American labor policy without becoming thoroughly disillusioned about two of our most important branches of government--Congress and the Supreme Court. Ever since [the] first interpretation of Section 20 of the Clayton Act, almost all educated opinion in this country has been that the Supreme Court sold organized labor down the river when it construed this section. But there is another angle to this. Several astute lawyers thought that Congress was the body which had betrayed the labor unions when it enacted Section 20. They believed that Congress deliberately made this section ambiguous * * * . These same lawyers thought that Congress had all the time actually hoped and believed that the Supreme Court would nullify by construction the liberal implications of the section." Gregory, op. cit., p. 170.

This brief sketch of the background of the Clayton Act shows the futility of attempting to ascribe any intent to the labor provisions of the Act. An examination of the face of the Act, however, may prove helpful in understanding the cases that came under it.

THE LABOR PROVISIONS OF THE CLAYTON ACT

Sections 6 and 20 were the more important labor sections of the Act. Section 6 reads as follows:

> Section 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.[15]

Insisting that the labor of a human being was not a commodity or an article of commerce was not done to repudiate Karl Marx' famous charge as to the status of labor under capitalism. The point was that if labor was not an article of commerce, it would not be subject to the restrictions and laws covering the movement of commodities in interstate commerce. That part of the section upholding the legality of labor organizations is strange since this right to organize had long since been recognized. The concluding part of the section definitely removes

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[15] Compare this section with the proviso (the one that was buried in the Judiciary Committee) excluding labor from the Sherman Act. Cf. ante p. 51.

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labor from the provisions of the anti-trust laws. This is in keeping with the opening sentence. There is one joker in the section, however. Labor cannot be forbidden or restrained when it is "lawfully carrying out the legitimate objects thereof." This would clearly throw into the lap of the Supreme Court the burden of interpreting lawfully and legitimate. If the Court decided that all that hadtheretofore been considered unlawful and illegitimate was still the law, labor had gained nothing by Section 6. And this proved to be so, for in the first case to arise under the Clayton Act,[16] Justice Pitney writing the majority opinion declared: "As to section 6, it seems to us its principal importance in this discussion is for what it does not authorize, and for the limit it sets to the immunity conferred. * * * But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade." The Paine Lumber Company Case[17] had already foreshadowed this decision in the Duplex Case. It now appeared that labor's hope for relief were doomed to disappointment as far as the Clayton Act was concerned.

Section 20 of the Law seemed to promise labor definite injunctive relief. Close analysis of the section, however, reveals the following ambiguities:[18]

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16 Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921).

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Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees,

Does this mean between an employer and his employees? The word his is not used; it could very well mean that persons not in the employ of the employer in question would be immune under this section. The union for example! Or employees of another employer! The Supreme Court did not think so.[19] The meaning is obscure and amenable to any interpretation. This mistake was not repeated in the Norris-LaGuardia Act.[20] Do employees on strike still retain their status as employees? The "area of economic conflict" must include the right to strike if labor is not to be hamstrung. It would be mockery then to take away the striker's status as an employee. Surely Congress could not have meant this since later in the section it gives labor the right to strike. It is strange that this point was not cleared up in the Act since Congress was not unaware of the problem.[21]

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[19] In the Duplex Case the Supreme Court held that this phrase meant the relationship existing between "those who are proximately and substantially concerned as parties to an actual dispute...", (i. e., an employer and his employees), 254 U. S. 443 (1921).

[20] Section 13 (c) of the Norris-LaGuardia Act, infra p. 130.

[21] The question was discussed in Congress. 51 Cong. Rec. 9654-55. See Frankfurter and Greene, op. cit. p. 161. The National Labor Relations Act of 1935 defined workers on strike as employees. Section 2 (3) reads: "The term 'employee'...shall include any individual whose work has ceased

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or between employers and employees,	The use of the plural in a law is not unusual since it is a legal device to cover every contingency. What contingency did Congress wish to cover here? An industry-wide dispute? A general strike? It is hard to say. The Supreme Court supplied an answer: "Congress had in mind particular industrial controversies, not a general class war."[22]
or between employees, or between persons employed and persons seeking employment,	This could apply to a jurisdictional strike between two groups of employees both claiming jurisdiction over a particular job, or between employees and unemployed craftsmen both claiming jurisdiction over a job to be performed for the employer in question, or between two groups of employees each wanting a different union to represent their shop. Again the words are amenable to any construction.
involving or growing out of, a dispute concerning terms or conditions of employment,	This does not seem to cover a dispute to unionize a shop. If that is so, nothing new has been granted to labor. It is an empty formula to allow a dispute "concerning

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as a consequence of, or in connection with, any current labor dispute. . ." The Taft-Hartley Act does not change this definition.

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unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

terms or conditions of employment" without the prerequisite of being able to organize in order to bargain collectively. If first things come first, it would seem logical that such a prerequisite is understood. Yet, many of the lower federal courts held that "the statute was . . . inapplicable when the strike was to unionize a factory or generally, for a purpose other than immediate betterment of working conditions."[23]

This proviso merely states what has always been a part of equity jurisprudence. Injunctions have always been granted to prevent irreparable injury to property where there is no adequate remedy at law. By neglecting to define irreparable and property, Congress has tacitly approved the interpretations given to these terms by the courts in prior labor injunction cases.

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And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do;

This obviously grants the right to strike (note the use of the words in concert), but this right had already been recognized by a Supreme Court which did not think that it conflicted with the right to issue an injunction. In the Debs Case, the Court found that the injunction did not challenge the "right of any laborer, or any number of laborers, to quit work . . . "

or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information or from peacefully persuading any person to work or to abstain from

This seems to sanction picketing, but this word was not used, and the omission was noticed by the Supreme Court.[24] The words lawfully and peacefully were to be held incompatable with picketing. "It is idle to talk of peaceful communication. * * * The name 'picket' indicated a militant purpose, inconsistent with peaceful persuasion."[25] Thus nothing was

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[24] "The phrase really recognizes as legal that which bears the sinister name of 'picketing' which it is to be observed Congress carefully refrained from using in section 20." Taft, C. J., American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184 (1921). Case reprinted in Handler, op. cit., pp. 114-122.

[25] Ibid., p. 118.

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working;	changed. "This introduces no new principle into . . . equity jurisprudence . . . ." Labor's conduct was to be subject to the same restraints that applied prior to this section.[26]
or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do;	A boycott seems to be implied here. But what kind of a boycott? The words peaceful and lawful could very well mean that nothing new was granted than what had already been allowed by the courts. This in fact was the case, as it is noted by the Court in Duplex Printing Press Company v. Deering: "the section as reported was carefully prepared with the settled purpose of excluding the secondary boycott and confining boycotting to the parties to the dispute. . . "
or from paying or giving to, or withholding from, any person engaged in such dispute, any strike	The payment of strike benefits was never a point of contention in the Supreme Court.

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[26] The Supreme Court in the American Steel Foundries Case described what this conduct should be. (Infra p.105). It said, however, that: "Each case must turn on its own circumstances." This would place upon labor the burden of fitting its conduct to the circumstances, never certain, however, that its actions would be those approved by the courts.

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or from peaceably assembling in a lawful manner, and for lawful purposes;	This seems unnecessary since the Constitution (Article I) already gave "the right of the people peaceably to assemble."
or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto;	Does this mean that a person engaged in a labor dispute retains the privileges and immunities granted to him under the Constitution? It is difficult to see how it could mean otherwise, for this part of the Act is concise and unfettered by ambiguities. In that case, the right to work or not to work, or to purchase or not to purchase (a right which is exercised by one person or another almost daily) is retained by a worker in a labor dispute. In the Bedford Case, however, the Supreme Court enjoined simple refusal to work!
nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.	Unfortunately very little was specified in the paragraph but much was alluded to. Nor does this concluding remark lend constitutionality to the section, for the Supreme Court could have found it unconstitutional.

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These comments on Section 20 do not pretend to embrace all the interpretations that could be placed upon the various phrases, nor the more important ones. The attempt rather is to present a thought-provoking analysis.

Sections 17, 18, and 19 of the Act deal with the procedural aspects of the injunction. Section 17 is intended to limit the use of ex parte restraining orders.[27] No restraining orders may be issued without notice unless it can be proved under oath that the complainant will suffer irreparable damage. If such an order is issued, it cannot remain in effect for more than ten days (unless good cause is shown), at which time a hearing must be held if a temporary injunction is desired. Section 18 requires that the applicant for a restraining order or a temporary injunction must give security which will be forfeited and paid to the defendant if he suffers injury from an injunction wrongfully issued. Section 19 seeks to prevent the issuance of blanket injunctions.

These sections were intended to correct certain procedural abuses, yet fourteen years after the Act was passed, Frankfurter and Greene were compelled to observe that: "More restraining orders without notice have been granted by federal courts within that period of time than in any prior period of like duration."[28] Sections 18 and 19 fared no better at the hands of the courts.[29]

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[28] Frankfurter and Greene, op. cit., pp. 185-186.

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Sections 21 and 22 pertain to contempt proceedings. Section 21 stipulates that any person who disobeys the injunction may be proceeded against for contempt. Section 22 stipulates that a person believed guilty of contempt is entitled to a trial by jury if he so desires, unless the contempt was committed in the presence of the court, or unless the contempt was in violation of an injunction issued on behalf of the Government.

Not only did the Clayton Act fall short of granting labor the desired relief from the injunction, but one section in the Act exposed labor to more injunction suits than had been possible under the Sherman Act which provided that only the Government could bring injunction suits under the anti-trust laws. Section 16 of the Clayton Act, however, allows private injunction suits to enjoin violations of the anti-trust laws. This resulted in an increase of private injunction suits.[30]

When Peter the Great was first defeated by the Swedes, he was not discouraged. He was reported to have said that this defeat had taught him how to beat the Swedes should he encounter them in the future. In this sense then, the Clayton Act was not a total defeat for labor. The experience of the Clayton Act in the courts, while disappointing to labor, revealed the weaknesses of the law, so that in the next piece of labor legislation the same mistakes were not repeated. The Norris-LaGuardia Act accomplished what labor expected of the Clayton Act and even more.

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CHAPTER XI

LANDMARK CASES PRECEDING THE NORRIS-LAGUARDIA ACT

DUPLEX PRINTING PRESS CO. v. DEERING[1]

This was a suit in equity brought by the Duplex Printing Press Company, a Michigan corporation manufacturing printing presses in that state, for an injunction to enjoin the actions of the defendants who maintained a boycott of the complainant's products to further a conspiracy to injure its property and to destroy its interstate trade. The bill was filed in the Federal District Court of the Southern District of New York,[2] in April, 1914, and an ex parte restraining order was issued by the court. A temporary injunction was granted on April 30, 1914, and in May, 1917, when the hearing for a final decree was held, the bill was dismissed, and the temporary injunction was vacated. This ruling was affirmed by the Circuit Court of Appeals on May 25, 1918, but reversed by the Supreme Court on January 3, 1921, with three justices dissenting.[3]

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[1] 254 U. S. 443 (1921); reprinted in Handler, op. cit., pp. 259-270; also in Sayre, op. cit., pp. 440-453. History of the case is given in Frankfurter and Greene, op. cit., pp. 165-171.

[2] Federal jurisdiction was invoked because of "diversity of citizenship" and the "Federal" question. The former means that the parties to a federal suit must reside in different states. In this case the complainant was a Michigan corporation, and the defendants were located in New York. The "Federal" question pertains to Federal law. In this case the defendants were alleged to be in violation of the Sherman Act.

[3] The majority opinion was written by Justice Pitney with White, C J., McKenna, Day, Van Devanter, and McReynolds, J. J. concurring; Justice Brandeis wrote the dissenting opinion with Justices Holmes and Clarke concurring.

The facts of the case were as follows: The Duplex Printing Press Company operated its factory in Battle Creek, Michigan on an "open shop" basis with both union and non-union men employed. The defendants, members of unions affiliated with the International Association of Machinists, were accused of combining to compel the unionization of the complainant's factory, and to achieve a "closed shop," the eight-hour day and the union scale of wages. To enforce these demands, the defendants were alleged to have interfered with, and restrained, the interstate commerce of the complainant. None of the defendants were ever employed by the complainant, nor did the complainant ever have relations with the union in question. The complainant sold presses all over the United States with a great deal of its business concentrated in New York City. The prayer complained of, and sought to have restrained, the following acts on the part of the defendants: warning customers not to purchase Duplex presses, or having purchased them, not to install them, threatening customers with loss if they should do so; threatening customers with sympathetic strikes in other trades; threatening a trucking company with trouble if it continued to haul the presses; inciting the employees of the customers and of the trucking company to strike in order to interfere with the hauling and installation of the presses; notifying repair shops not to service the presses; threatening union men with loss of membership if they aided in installing the presses and coercing them further with a "scab" blacklist; threatening an exposition company with a strike if it displayed the Duplex presses; and interfering in various other ways with the sale of the presses in New York City and with their movement in interstate commerce.

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The Clayton Act was passed after the beginning of the suit, but before the hearing, and for that reason the Act was held to apply to the case. The question was whether such a boycott as was being conducted by the defendants had been legalized and rendered immune from the injunction by the Clayton Act. The District Court and Circuit Court of Appeals held that it had been. Judge Hough of the District Court felt that the words employers and employees would "be given a strained and unusual meaning"[4] if they did not refer to the litigants in question. The limiting word his had not been used, and therefore a labor dispute was not confined to an employer and his employees. The Circuit Court of Appeals recognized that the defendants were conducting a secondary boycott, but it held that Section 20 legalized such a boycott, and it affirmed the holding of the District Court. The majority of the Supreme Court reversed these decisions.

Justice Pitney writing the majority opinion arrived at the following conclusions:

1. The employer's right to do business is a property right and as such it may be protected from irreparable damage by the injunction.[5]

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4 From decision cited in Frankfurter and Greene, op. cit., p. 167.

5 "That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference." The defendant's actions constituted unlawful injury and interference. "Hence the right to injunction is clear if the threatened loss is due to a violation of the Sherman Act as amended by the Clayton. . . ." Justice Pitney added that "there is nothing in /Section 6/ to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken

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2. The privileges and immunities of Section 20 extend only to disputes between an employer and his employees.[6]

3. Section 20 did not legalize the secondary boycott.[7]

4. The instigation of a sympathetic strike in furtherance of a secondary boycott was not "peaceful and lawful" persuasion.[8]

In his dissenting opinion, Justice Brandeis found economic

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as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws." Handler, op. cit., pp. 261-63.

[6] "It is very clear that the restriction upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described." Handler, op. cit., p. 263. Judge Hough of the lower court had not found this "very clear" but "strained and unusual". Frankfurter and Greene, op. cit., p. 167. Justice Pitney adds: "full and fair effect will be given to every word if the exceptional privilege be confined--as the natural meaning of the words confines it--to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective." Handler, op. cit., p. 264.

[7] The Court cited Loewe v. Lawlor and other decisions to show the illegality of a secondary boycott. "It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition as one accompanied by force or threats of force." Ibid., p. 262. As to the meaning of Section 20, the Court said ". . . the section as reported expressed the real purpose so well that it could not be tortured into a meaning authorizing the secondary boycott." Ibid., p. 266.

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The minority saw in these facts a threat to the existence of the union--a threat which the union had to meet in self-defense. "Defendants' justification [for their acts] is that of self-interest. . . . They have injured the plaintiff, not maliciously, but in self-defense." The minority displayed a deep insight into the struggle between capital and labor and the legal area of economic conflict that should attend such a struggle. Economic realities do not permit a conglomeration of wage scales within a single industry nor polygot working conditions. Sooner or later competition forces the higher standards to the level of the lower if the latter are tolerated. Nor could one group of workmen look with indifference upon what was happening to another group. This is not a novel principle; Lincoln had long ago said: "A house divided against itself cannot stand."

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self-interest attending labor organizations in a classic passage of his opinion:

> A single employer might, as in this case, threaten the standing of the whole organization and the standards of all its members; and when he did so the union, in order to protect itself, would naturally refuse to work on his materials wherever found. When such a situation was first presented to the courts, judges concluded that the intervention of the purchaser of the materials established an insulation through which the direct relationship of the employer and the workingmen did not penetrate; and the strike against the material was considered a strike against the purchaser by unaffected third parties. But other courts, with better appreciation of the facts of the industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself.[9]

The remainder of the minority opinion was concerned with putting a different construction on Section 20 than had been applied by the majority. Justice Brandeis held, for example, that "Congress did not restrict the provision to employers and workingmen in their employ." It's not so important that the Court split over the interpretation of the Act, the majority had set a standard which was to be maintained for the next decade; it is important, however, that the minority recognized that the existence of an industrial struggle demanded an allowable area of economic conflict and that the limits of this area should be determined by the legislative and not the judiciary branch of government.[10] This standard was later used in the Norris-LaGuardia Act which so clearly

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expressed the will of Congress that the primary job of the courts was to enforce the Act rather than to speculate upon its meaning.

AMERICAN STEEL FOUNDRIES v. TRI-CITY CENTRAL TRADES COUNCIL[11]

Less than a year after the Duplex Case had passed upon the legality of the secondary boycott under the Clayton Act, the meaning of Section 20 was scrutinized by the Court once more--this time in regards to picketing; the occasion was the American Steel Foundries Case. The American Steel Foundries, a New Jersey corporation, operated a plant in Granite City, Illinois. In May, 1914, it petitioned the Federal District Court of the Southern District of Illinois for an injunction against the Tri-City Central Trades Council and others[12] to enjoin them "from carrying on a conspiracy to prevent complainant from retaining and obtaining skilled laborers to operate its plant." The complainant alleged that the conspiracy was perpetrated by means of organized picketing, threats, and intimidation against its employees and prospective employees.

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combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." Handler, op. cit., pp. 269-70.

[11] 257 U. S. (1921), reprinted ibid., pp. 114-122.

[12] As the corporation was from New Jersey and as the defendants were citizens of states other than New Jersey, the American Steel Foundries was able to invoke federal jurisdiction because of "diversity of citizenship."

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The Tri-City Trades Council, a labor organization representing thirty-seven trade unions in Illinois, protested to the complainant when a wage cut was instituted at the latter's factory. The complainant notified the Council that it ran its factory on an open shop basis, and, therefore, it would not deal with the union. As a result, the Council called a strike at the complainant's plant, but only two of the employees heeded the strike call--defendants Churchill and Cook. Picketing was then put into force by the Council, and evidence disclosed that the following conduct took place: Employees were threatened to keep away from the plant; a sign was displayed outside the plant calling attention to the strike and advising employees and other workers to stay away in order that a wage increase might be secured; one of the employees, master mechanic Hall, was handed a circular of the Trades Council by one of the defendants and was told:

> We don't like the way you have treated our boys down here, and we just came down to raise a little hell.

Three or four groups of pickets patrolled the plant, and there were from four to a dozen men to the group. One April 30th, an employee was assaulted by three of the pickets, and more attacks occurred within the next few days. On May 18, 1914, the District Court issued the restraining order, and all "disturbances ceased."

The defendants admitted picketing the plant, but alleged that persuasion was the means by which they sought to induce the people to stay away from the complainant's factory. The ruling of the Distrist Court was, however, very drastic. The final decree was a blanket

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injunction[13] which "perpetually restrained and enjoined from in any way or manner whatsoever by use of persuasion, threats, or personal injury, intimidation, suggestion of danger, or threats of violence of any kind, interfering with, hindering, obstructing or stopping any person engaged in the employ of the American Steel Foundries," or who sought to be employed there. Persuasion was also ruled out as a means of inducing employees to leave the employ of the American Steel Foundries or of preventing others from working there. The injunction further enjoined the defendants "from picketing or maintaining at or near the premises of the complainant, or on the streets leading to the premises of said complainant, any picket or pickets. . . ."[14]

On December 16, 1916, the Circuit Court of Appeals modified the injunction by permitting persuasion and by restraining only that picketing that was carried on "in a threatening or intimidating manner."[15] On December 5, 1921, the Supreme Court affirmed the first modification which allowed persuasion, but reversed the second.

The Court ruled that the Clayton Act applied because the case in question was argued in the Circuit Court of Appeals after the Act was passed. Chief Justice Taft writing the majority opinion[16] adhered to the

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[13] The "blanket" clause read as follows: ". . . the said defendants . . . and each of them, and all persons combining with, acting in concert with, or under their direction, control or advice, or under the direction, control, or advice of any of them, and all persons whomsoever. . . ." Reprinted in Frankfurter and Greene, op. cit., p. 88. This clause was allowed to stand by the Supreme Court despite Section 19 of the Clayton Act restricting such catch-all clauses.

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Duplex decision by stating that Section 20 introduced "no new principle into the equity jurisprudence of [the federal] courts. It is merely declaratory of what was the best practice always." Chief Justice Taft then sought to show that picketing was not the "best practice always" because it could not be peaceable[17] nor could it be lawful[18], and he cited for support "many well reasoned authorities." Furthermore, he called attention to the fact that "that which bears the sinister name of 'picketing'" was "carefully" omitted by Congress from Section 20. His point was that the qualification placed upon the word picketing by the Circuit Court was inadequate and that picketing per se was illegal. The Court recognized, however, that in an economic struggle the strikers should be given some opportunity to induce other employees to join their ranks, and for this purpose the Court introduced the "missionary doctrine" which would not conflict "with the right of the employer incident to his property and business to free access of such employees" as picketing would have done. The "missionary doctrine" was to be flexible so that it could vary with the circumstances of each case; and Chief Justice Taft described the doctrine as follows:

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judgment of the Court; Justice Clarke dissented.

[17] "It is idle to talk of peaceful communication in such a place and under such conditions. The numbers of the pickets in the groups constituted intimidation. The name 'picket' indicated a militant purpose, inconsistent with peaceable persuasion." Handler, op. cit., p. 118.

[18] "Our conclusion is that picketing thus instituted is unlawful and can not be peaceable and may be properly enjoined by the specific term because its meaning is clearly understood in the sphere of the controversy by those who are parties to it." Ibid., p. 119.

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[18] "Our conclusion is that picketing that intimidates is unlawful and can not be peaceable and may be properly enjoined by the specific term because its meaning is clearly understood in the sphere of the controversy by those who are parties to it." Ibid., p. 119.

> . . . We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representatives should have the right of observation, communication and persuasion, but with special admonition that their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly,[19] and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence and which may be varied in other cases. It becomes a question for the judgment of the chancellor who has heard the witnesses, familiarized himself with the locus in quo and observed the tendencies to disturbance and conflict. The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries.[20]

Then, paradoxically as it may seem, the Court decided that the decision in the Duplex Case could "have no bearing here" and it held that the right to persuasion could be exercised not only by an ex-employee of the complainant but also by those defendants who had never been employed, or contemplated being employed, by the complainant. The Court justified this on the following grounds:

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[19] The Court indulges in semantic calisthenics by preferring the word missionary to that of picket but it would require more than semantics to transform the "in concert" of Section 20 to the "singly" of the Supreme Court.

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[20] Handler, op. cit., pp. 119-120.

> Is interference of a labor organization by persuasion and appeal to induce a strike against low wages, under such circumstances without lawful excuse and malicious? We think not. . . . A single employee was helpless in dealing with an employer. . . . Union was essential to give laborers opportunity to deal on equality with their employer. . . . The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wage will injure their whole guild.[21]

This was a suprising conclusion for the Court to reach considering that Chief Justice Taft did not think that it conflicted with or overruled the Duplex decision. In the Duplex Case where the defendants resided in New York and the complainant operated its factory in Michigan, the Court decided that Section 20 of the Clayton Act did not offer relief because the defendants were not employees of the complainant. In the American Steel Foundries Case where the defendants resided in Illinois and vicinity and the complainant operated its plant in Illinois, the Court decided that the privileges of Section 20 (as interpreted by the Court) applied even though the parties to the dispute did not stand in the proximate relationship of an employer and his employees. It may be, as is suggested by Frankfurter and Greene, that Chief Justice Taft based his conclusions on the smaller geographical area involved in the American

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Steel Foundries Case.[22]

BEDFORD CUT STONE COMPANY v. JOURNEYMEN STONE CUTTERS' ASSOCIATION[23]

In the Bedford Cut Stone Case the Supreme Court ordered an injunction against the Journeymen Stone Cutters' Association to enjoin refusal to work upon non-union material. The facts of the case were simple. The Bedford Cut Stone Company and twenty-three others, mostly all Indiana Corporations, were engaged in the business of quarrying and cutting Indiana limestone, a great part of which was sold in interstate commerce.[24] The plaintiffs operated their business under a union agreement with a local of the General Stone Cutters' Union until 1921, at which time a dispute over terms caused the plaintiffs to terminate their agreement. A strike was followed by a lockout; and the plaintiffs organized "a so-called independent union"[25] with which they entered into agreement "closing their shops and quarries against the members of the General Union and its locals."[26] The General Union thereupon issued a notice to its members not

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22 "The justification of a substantial common concern so clearly expounded by the Chief Justice was present in the Duplex as well as in the Tri-City case, unless the Court rested the differences in result between the two cases upon the fact that in the Tri-City Case the stage of the controversy was confined to a smaller geographic area." Frankfurter and Greene, op. cit., p. 173.

23 274 U. S. 37 (1927) Case reprinted in Raushenbush and Stein, op. cit., pp. 167-174; reprinted in part in Handler, op. cit., pp. 270-272; separate opinion of Justice Stone reprinted in part in Frankfurter and Greene, op. cit., p. 176.

24 The amount sold in interstate commerce was 75%. Mounce, op. cit., p. 120

25 The words used by Justice Brandeis in his minority opinion; alluding, of course, to the fact that such a union was a company union.

26 The fact that there was a lockout was recognized by Justice Sutherland from whose opinion these words are quoted.

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to work on stone "that has been started--planned, turned, cut, or semi-finished--by men working in opposition to our organization."[27]

Although the General Union had been locked out of the plaintiffs' shops and quarries in Indiana, the significance of its order lay in the fact that most of its members were employed outside the state of Indiana, on buildings where the complainants' stone was used. Upon the issuance of the order, these stone workers, members of the defendant union, refused to work on the stone of the plaintiffs;[28] whereupon the Bedford Cut Stone Company sought to have this refusal enjoined.[29] The injunction was denied by the District Court on November 13, 1924, and this decree was affirmed by the Circuit Court of Appeals on October 28, 1925. On April 11, 1927, the Supreme Court reversed the decree and granted the injunction.

Justice Sutherland in writing the majority opinion called the union's action "a course of conduct which directly and substantially curtailed . . . the natural flow in interstate commerce . . . to the gravely probable disadvantage of producers, purchasers, and the public; and it must be held to be a combination in undue and unreasonable restraint of such commerce within the meaning of the Anti-Trust Act as

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[27] Order reproduced in majority opinion.

[28] Some members refused to work on the plaintiffs' stone while others, who were found working on the stone, were warned that their union cards would be revoked if they continued.

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interpreted by this court."[30] It was the opinion of the Court that this conspiracy existed solely as a retaliatory measure to force the complainants to recognize the union. Such a purpose was not lawful, and the Court based its decision largely on the Duplex Case, which it reviewed at great length. But how similar were the facts in these two cases? It will be recalled that the machinists' union was alleged to have committed a great many acts, all of which were enjoined.[31] The stone cutters on the other hand were accused of only one act--refusal to work on non-union stone. This was the only action enjoined by the Court. The simplicity of the stone cutters' action can only be appreciated by enumerating the things that they did not do.

1. They did not engage in a secondary boycott, nor did they refuse entirely to work on the plaintiffs' stone.[32]

2. They did not instigate sympathetic strikes.[33]

3. They did not resort to picketing, violence nor threat of violence, nor intimidation of third parties.[34]

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[30] Raushenbush and Stein, op. cit., p. 170.

[31] See supra p.96 for the conduct of the machinists which allegedly included secondary boycotts, instigation of sympathy strikes, and intimidation of third parties.

[32] "They did not plan a boycott against any of the plaintiffs or against builders who used the plaintiffs' product. On the contrary, they expressed entire willingness to cut and finish anywhere any stone quarried by any of the plaintiffs, except such stone as had been partially 'cut by men working in opposition to' the Association." Justice Brandeis dissenting. Raushenbush and Stein, op. cit., p. 172.

[33] "There was no attempt to seek the aid of members of any other craft, by a sympathetic strike or otherwise." Justice Brandeis, loc. cit.

[34] "They were innocent alike of trespass and of breach of contract. They did not picket. They refrained from violence, intimidation, fraud and threats. They refrained from obstructing otherwise either the

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They merely refused to complete work started by non-union labor. If one stone cutter had refused to work on the stone, the injunction could never have been issued against him; but because the stone cutters had acted in concert, the Court had deemed their conduct unlawful.[35] The commentary of Justice Brandeis in his dissenting opinion was most appropriate:

> Observance by each member of the provision of their constitution which forbids such action was essential to his own self-protection. It was demanded of each by loyalty to the organization and to his fellows. If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds of involuntary servitude. The Sherman Law was held in United States v. United States Steel Corporation, 251 U. S. 417, to permit capitalists to combine in a single corporation 50 per cent of the steel industry of the United States dominating the trade through its vast resources. The Sherman Law was held in United States v. United Shoe Machinery Co., 247 U. S. 32, to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe-manufacturing in America. It would, indeed, be strange if Congress had by the same Act willed to deny to members of a small craft

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35 "An act which lawfully might be done by one, may when done by many acting in concert take on the form of a conspiracy and become a public wrong . . . ." Justice Sutherland, op. cit., p. 170. This doctrine goes back to the early American conspiracy cases and even beyond to People v. Wilzig (1562), see supra. p 36.

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> of workingmen the right to co-operate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so.[36]

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[36] Raushenbush and Stein, op. cit., p. 174; Justice Stone who concurred with the majority "largely on the authority of the Duplex Case" nevertheless observed in a separate opinion that "as an original proposition, I should have doubted whether the Sherman Act prohibited a labor union from peaceably refusing to work upon material produced by non-union labor or by a rival union, even though interstate commerce were effected." From separate opinion of Justice Stone reprinted in part in Frankfurter and Greene, op. cit., p. 176.

CHAPTER XII

THE FOURTEENTH AMENDMENT AND THE LABOR INJUNCTION

TRUAX v. BISBEE LOCAL NO. 380[1]

> Certainly, if a dispute between plaintiffs and a labor union exists . . . plaintiffs have no legal right to force the union to keep the facts secret. The extent of the publicity given in such dispute is unimportant and violates no right of plaintiffs, either civil or criminal. If the publicity given the existence of the dispute results in a loss of patronage and business to plaintiffs, such loss is attributable to the dispute, and not attributable to the publicity given to the dispute.
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> Consequently the mere publication of the existence of a strike and of its causes in a thorough manner is no ground for equitable interference. . . .[2]

This decision of the trial court in Arizona followed a dispute between one Truax, operating a restaurant in Bisbee, Arizona, and his employees after a reduction in wages and an increase in hours. A cook and the waiters went on strike and began to picket the restaurant. Truax claimed that the picketing was causing irreparable damage to his business and applied for equitable relief in the state courts. The defendants claimed exemption for their conduct under an Arizona statute which

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[1] 19 Ariz. 379, 389 (1918), opinion reprinted in part in Handler, op. cit., pp. 251-252.

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permitted peaceful picketing.[3] The trial court refused to issue an injunction as was seen above, and this decision was sustained by the Supreme Court of Arizona which based its ruling upon the Arizona statute. Truax finally appealed to the Supreme Court of the United States, and the case was heard under the title of Truax v. Corrigan.

TRUAX v. CORRIGAN[4]

The Supreme Court obtained jurisdiction in the Truax Case on the ground that the Arizona statute which denied equitable relief to Truax contravened the Fourteenth Amendment to the Constitution.[5] Chief Justice Taft writing the majority opinion described the conduct of the defendants, which though not violent, involved the following acts: patrolling in front of the plaintiffs' restaurant with a banner; announcing in alta voce in front of the plaintiffs' restaurant that he was unfair; stigmatizing plaintiffs' employees as scabs;[6] libelously charging that Truax was tyrannical and chased his employees down the street with a butcher knife; casting aspersions upon the plaintiffs' restaurant, his food, and his prices; ridiculing the mentality of patrons and inquiring of prospective

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[3] Ariz. Civ. Code (1913) par. 1464. This statute was similar to the Clayton Act which it preceded.

[4] 257 U. S. 312 (1921). Majority opinion of Chief Justice Taft and dissenting opinion of Justice Brandeis reprinted in Handler, op. cit., pp. 133-141; dissenting opinion of Justice Holmes reprinted in Raushenbush and Stein, op. cit., pp. 73-74; dissenting opinion of Justice Pitney reprinted in part in Frankfurter and Greene, op. cit., p. 179.

[5] Article XIV, Section 1 of the Constitution reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . ."

[6] This brings up the problem of what to call a spade if you can't call

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customers of the plaintiffs: "Can you patronize such a place and look the world in the face?"; and admonishing others with such phrases as "All ye who enter here leave all hope behind" and "Don't be a traitor to humanity."

Chief Justice Taft inquired as to whether these means were illegal and he submitted that they were. "Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction, and it thus was plainly a conspiracy." He concluded, therefore, that the Arizona statute, which allowed such conduct, deprived a person of his property[7] without due process of law and could not be constitutional under the Fourteenth Amendment.

The crux of the majority's decision lay in the fact that the Arizona statute denied equal protection of the laws as provided in the Fourteenth Amendment and as such was unconstitutional. That is, while the Arizona statute denied injunctive relief to the plaintiffs for the actions of his striking employees, he could have secured an injunction, if say, his business competitors had acted thus. The Court expressed this as follows:

> The necessary effect of these provisions and of Paragraph 1464 is that the plaintiffs in error would have had the right to an injunction against such a campaign as that conducted by the defendants in error, if it had been directed against the plaintiffs' business and property in any kind of a controversy which was not a dispute between employer and former employees.[8]

On this reasoning the ruling of the Arizona Supreme Court was

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[7] By property the Court meant the plaintiffs' right to do business. "Plaintiffs' business is a property right." Chief Justice Taft, Handler, op. cit., p. 137.

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reversed and the injunction granted.

Four Justices dissented and three separate dissenting opinions resulted.[9] The majority opinion demonstrated, however, that if labor was to achieve relief from the injunction and the anti-trust laws, it would have to depend on federal legislation.

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[9] Some of the highlights of these dissenting opinions were as follows: ". . . it is clear that the refusal of an equitable remedy for a tort is not necessarily a denial of due process of law. And it seems to be equally clear that such refusal is not necessarily arbitary and unreasonable when applied to incidents of the relation of employer and employee." Justice Brandeis, reprinted in Handler, op. cit., p. 140.
". . . By calling a business 'property' you make it seem like land and lead up to the conclusion that a statute cannot substantially cut down the advantage of ownership existing before the statute was passed. . . . But you cannot give it definiteness of contour by calling it a thing." Justice Holmes, reprinted in Raushenbush and Stein, op. cit., pp. 73-74.
". . . I find no authority for the proposition that the guaranty was intended to secure equality of protection 'not only for all but against all similarly situated,' except as between persons who properly belong to the same class." Justice Pitney, reprinted in Frankfurter and Greene, op. cit., p. 179.

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CHAPTER XIII

THE ABUSES OF THE LABOR INJUNCTION

Most of the labor injunction cases that have come before the Supreme Court thus far have been covered. These landmark decisions reveal that the Court had put narrow limits to the actions of organized labor. Labor was a consistent loser in the courts, and legislation did not offer the desired relief because it was loosely drawn. Strikes, picketing, and boycotts were held illegal or were vastly circumscribed in scope. On the other hand, the yellow-dog contract was given a sweeping mandate. Above all, these cases portray the intensity of the economic struggle between capital and labor. It was seen how the employer was aided in the struggle by an efficacious legal weapon--the labor injunction.

The nature of the labor injunction was such that it worked a hardship on the activities of organized labor. In this connection many writers speak of the abuses of the labor injunction.[1] The following analysis will illustrate what they had in mind.

An employer beset by labor difficulties and desirous of an injunction could file a bill in equity or a complaint with the court. These complaints were usually drawn up in sterotyped fashion without

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[1] Gregory, op. cit., Chapter IV; Handler, op. cit., pp. 141-144; material for this chapter was also gathered from the dissenting opinion of Justice Brandeis in Truax v. Corrigan; Frankfurter and Greene, op. cit., Chapters II and III; Commons and Andrews, op. cit., 413ff.; Stein et al., Labor Problems in America (New York: Farrar & Rhinehart, Inc., 1940), Chapter 29.

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[1] Gregory, op. cit., Chapter IV; Mandler, op. cit., pp. 181-184; material for this chapter was also gathered from the dissenting opinion of Justice Brandeis in Duax v. Corrigan; Frankfurter and Greene, op. cit., Chapters II and III; Commons and Andrews, op. cit., 1247; Stein et al., Labor problems in America (New York: Farrar & Rinehart, Inc., 1940), Chapter 29.

particular regard to the facts of the case. In many instances a formula that had proved successful in a prior case was employed verbatim. In order to secure an injunction, the mere recitation of the following sterotyped complaint was sufficient: the complainant had property and business goodwill; a conspiracy existed to damage the same; the conspirators were striking or were inducing a strike or were using threats and intimidation in furtherance of the conspiracy; and irreparable injury for which there was no adequate remedy at law would ensue. It was not necessary to mention specific conduct on the part of the defendants.

The complainants also had the choice of tribunals in presenting their bills, and they could petition a judge who was not actually sitting on the bench at the time the restraining order was desired. Naturally the custom developed of petitioning only those judges who could be depended upon to issue the injunction. Since the federal courts were more prolific in issuing injunctions, the employer's attorney used, whenever he could, diversity of citizenship and the federal question in order to present the complaint before a federal judge. Of 2,000 injunctions issued between 1880 and 1932, one fourth were federal injunctions. The federal courts refused to grant injunctions in only six per cent of the cases to come before them; whereas the state courts denied the injunction in twelve per cent of the cases.[2]

If the judge was convinced of the allegations as stated in the complaint (no witnesses were called upon to refute them), he would issue an ex parte restraining order without notice to the union or its members.

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[2] Stein et al., op. cit., p. 324.

This was designed to maintain a status quo until a hearing could be held. This meant that the parties to the dispute must assume the position that they held prior to the controversy until a hearing could be held to determine whether the defendants were acting unlawfully. It did not necessarily follow that the acts restrained were actually being perpetrated or threatened by the defendants. In a great many instances the courts enjoined conduct that was probably never contemplated by the defendants. This anticipated and rendered illegal in advance any conceivable action on the part of the defendants. To disobey the order was prima facie evidence that the defendants were in contempt of court and ipso facto subject to punishment. For the defendants to protest that they were committing none of the alleged acts, would have elicited the reply from the court that if this were so, then there was no harm in issuing the restraining order. The psychological effects of such an order, however, hampered the activities of the union or the workers in a dispute, for they were never sure when they would step out of bounds. Furthermore, it made them feel the weight of the courts tossed into the scales against them. Workers untutored in the ways of the law were easily discouraged by this damoclean sword suspended above them, and would rather return to work than to continue a hopeless struggle.

If the workers decided to continue the struggle, they would have to persuade the judge on the strength of affidavits to vacate the order. This opportunity was presented to them at the hearing for a temporary injunction which was normally held within ten days of the issuance of the ex parte order, but which was in many cases postponed. This delay could easily prove fatal to the union, for a strike is usually won in

its early stages. At the hearing the judge had to decide whether or not to issue a temporary injunction on the basis of highly colored and conflicting affidavits without the opportunity of hearing witnesses cross-examined. Because of the nature of these affidavits, the court had to exercise considerable discretion in granting temporary injunctions. This deplorable situation was described by Judge Amidon in Great Northern R. Co. v. Brosseau:

> . . . affidavits are an untrustworthy guide for judicial action. That is the case in all legal proceedings, but it is peculiarly true of litigation growing out of a strike, where feelings on both sides are necessarily wrought up, and the desire for victory is likely to obscure nice moral questions and poison the minds of men by prejudice.[3]

On this flimsy and questionable sort of evidence injunctions were granted that were very often sweeping in scope or obscure as to the sort of conduct that was being enjoined. These "drag-net" clauses in their endeavor to put a quietus on any unlawful activity enjoined "threats," "intimidation," "coercion," and "unlawful acts" without bothering to define these terms. Some clauses went all out in their restraint as in the Tri-City Case in which "any acts or things whatever in furtherance of any conspiracy" were enjoined. Many injunctions prohibited the use of language that was "bad," "indecent," "annoying," or "abusive."[4] The use of the epithets "scab," "traitor," and "unfair"[5]

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[3] 286 Fed. 414 (D. N. Dak., 1923), from case reprinted in Handler, op. cit., p. 123.

[4] Frankfurter and Greene, op. cit., p. 98.

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[3] 290 Fed. 918 (D. N. Dak., 1923). Same case reported in Sandmeyer, op. cit., p. 129.

[4] Frankfurter and Greene, op. cit., p. 92.

[5] Loc. cit.

was also enjoined. In one dispute in which ninety per cent of the workers spoke a foreign language, the judge prohibited the use of any but the English language.[6] In another case even silence was found coercive. Thus the court enjoined a lone picket who patrolled in silence because "silence is sometimes more striking and impressive than the loud mouthings of the mob." The court likened the solitary vigil of this picket to the terrifying effects of the swinging pendulum in Poe's tale "The Pit and the Pendulum."[7] The injunction was also used to enjoin such purely economic weapons as the strike and the conduct so necessary to carry on a strike--inducing others to strike, the payment of strike benefits, peaceful persuasion, giving publicity to the facts in the dispute. Even simple refusal to work was enjoined as was seen in the Bedford Cut Stone Case. It may seem redundant to recite the specific acts forbidden when it could be said simply that anything "whatsoever" was forbidden in a great many cases. But this would leave too much to the reader's imagination, and no reader would ever imagine that a court would prohibit the singing of such hymns as "Nearer my God to Thee." Yet such was the case in a Pennsylvania dispute where the judge enjoined all meetings and hymns on church property that was over one quarter of a mile from the coal mine that was being struck![8]

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[6] Clarkson Coal Mining Co. v. United Mine Workers (S. D. Ohio, 1927) unreported., case discussed ibid., p. 103; concerning this same case, the judge declared that he would have any man who was not an American citizen deported if such a person violated the injunction. Ibid., p. 59.

[7] Gevas v. Greek Restaurant Workers' Club, 99 N. J. Eq. 770 (1926); excerpt from case cited ibid., p. 182.

[8] Pittsburgh Terminal Coal Corp. v. United Mine Workers of America, No. 1909 Equity, 1927 (D. S. W. D. Pa) unreported; case discussed ibid., pp. 101-102, footnote 91. The incident took place at Rossiter, Pennsylvania, and the injunction was issued by Judge Langham of the

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Thus it is seen that the injunction failed to inform the defendants of the specific acts which they were forbidden to do, or it enjoined acts which would have been permissible in the absence of a labor dispute. In addition many injunctions contained the "omnibus" clause which extended the injunction to all persons "whomsoever." This prevented anyone from rendering any aid to the defendants, and corralled persons outside the dispute and forced them to pay heed to the terms of the injunction. Thus a barber who displayed a sign "No Scabs Wanted in Here" was held in contempt of court.[9]

At all hearings the judge determined the facts without the assistance of a jury. Contempt proceedings were conducted by the judge, who had granted the injunction, without benefit of a jury, and evidence was submitted in the form of affidavits. Since it was his order that had been violated, the judge's position was not as impartial as might be hoped, and the form of punishment lay at his discretion.

In cases involving federal jurisdiction, the defendants might ultimately appeal to the Supreme Court, but the expense involved in such a procedure made this course of action prohibitive to all but the larger and more prosperous unions. Furthermore, so much time was consumed in appellate proceedings, that the final decree, if it had been rendered in favor of the defendants, would have been nothing more than a moral victory.

Pennsylvania State Court. Lester reports that the judge in this case later admitted that he had $6,000 invested in the coal company. Lester, op. cit., p. 808.

[9] United States v. Taliaferro, 290 Fed. 214 (W. D. Va., 1922) Case discussed in Frankfurter and Greene, op. cit., p. 113; see also Gregory, op. cit., p. 101.

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[2] United States v. Latimer, 290 Fed. 271 (W. D. Va., 1922) case discussed in Frankfurter and Greene, op. cit., p. 113; see also Gompers, op. cit., p. 101.

While awaiting appellate jurisdiction the defendants were compelled to obey the injunction, for an injunction, though wrongfully issued, must be obeyed. It would be ironical if after years of litigation, the defendants were to be told that the injunction had been wrongfully issued and they need not obey it. The Hitchman Case which remained in the courts for over ten years resulted in an adverse decision for the defendants. But if the Supreme Court had ruled in 1917 that the injunction had been wrongfully issued in 1907, this would not have restored the defendants to the position they occupied in the earlier period!

Such was the nature of the injunction that led Justice Brandeis to say "that the real motive in seeking the injunction was not ordinarily to prevent property from being injured nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men."[10]

But it was not the injunction alone that curbed labor. The injunction was merely a device which was abused. The thing that led to this abuse was the state of mind of the judiciary. The industrial struggle was still an innovation when the first labor injunction cases began to come before the courts. These early judges could hardly be blamed if they looked upon strikes, picketing, and boycotts as highly irregular conduct which somehow seemed unlawful and ought to be enjoined. Many were property owners who were nutured in an environment where property was highly respected. They moved in the same social circles as the employers, and were inadvertently biased in the developing economic

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conflict which they honestly believed to be an attack upon property.[11] Nor were they aided by the law-making branch of the government which passed very little labor legislation to guide the courts. The courts had only the English common-law rule of conspiracy to guide them. The metamorphosis of the United States into an industrial nation required a new set of rules to govern the developing economic contest between capital and labor. There is nothing unhealthy about such a struggle anymore than there is anything wrong about business competition. This is perfectly clear now, but it cannot be expected that the courts could take this view at the inception of such a struggle. They were necessarily confined by their own Zeitgeist in which any encroachment upon property was abhorred and in which individualism was the ruling spirit. While unionism entailed collectivist action and aggressiveness if the workers' conditions were to be improved, the employers had the enviable position of maintaining that which was sanctioned by law and order and of protecting established rights from encroachment. The latter position is always favored by the courts which resist change until the need for change clearly becomes the expressed will of the people.[12] In those days the courts could not be certain that strikes, picketing, and boycotts were socially recognized economic weapons,

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[12] The expressed will of the people should then become law. "Government and the State should be, namely the will of the people expressed in terms of law." Levi, Carlo, Christ Stopped at Eboli (New York: The Penguin Books, Inc., 1948), p. 160.

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and it is little wonder that the Supreme Court was constantly seeking to narrow the allowable area of economic conflict to curb the growing power of labor. A few enlightened justices like Holmes and Brandeis saw the need for widening the allowable area of economic conflict to meet the exigency created by modern industry. There was the need to formulate rules of conduct so that employers and employees could conduct themselves accordingly, and the courts would know what they could or could not enjoin. If the labor injunction was being abused, this was so because, up to 1932, no one knew the limits to the allowable area of economic conflict.

CHAPTER XIV

THE NORRIS-LAGUARDIA ACT

SOME OF THE FACTORS THAT LED TO THE ANTI-INJUNCTION LAW OF 1932

The passage of the Norris-LaGuardia Act was the result of varied and complex factors. The effect of some of these factors was direct but their importance should not be overstressed; other factors while exerting only an indirect influence may have played a more important role in securing this legislation. In the final analysis, it was the timely combination of many events and factors that created the suitable climate for an anti-injunction law in 1932.

The agitation of the American Federation of Labor was certainly a prime mover. With the same resolute determination that made the Romans declare, "Delenda est Carthago," the leaders of the Federation cried out, " . . . we must abolish and wipe out this iniquitous menace"[1] when speaking of the injunction. The speeches and writings of Samuel Gompers were replete with attacks upon the injunction and with the demand for legislative relief.[2] After his death, the struggle was continued by President Green and Vice-President Matthew Woll. This agitation was accelerated in the

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twenties, and during this period John Frey, editor of the International Molder's Journal, wrote a stinging indictment of the injunction in his book, The Labor Injunction, and Andrew Furuseth, leader of the Seamen, conducted an active lobby against the labor injunction. This redoubled agitation in the twenties was the result of the treatment of the Clayton Act in the Supreme Court. In every case which involved an interpretation of the Clayton Act, and especially in the Bedford Case,[3] the deficiencies of that Law in offering injunctive relief were becoming patently clear. It can be said that the Supreme Court influenced the form of future anti-injunction legislation by exposing the inadequacies of the Clayton Act in this regard.

The anti-injunction campaign of the Federation received a real impetus when Professor Felix Frankfurter of Harvard took up the cudgel against the labor injunction. This not only lent prestige to the arguments against the injunction, but it also placed the struggle in more expert hands. In contrast to Frey's The Labor Injunction, which read like propaganda, Professor Frankfurter (now a Justice of the Supreme Court) with the aid of Nathan Greene wrote an effective indictment of the injunction which was based upon sound legal grounds. It is noteworthy that this book, also entitled The Labor Injunction, was published in 1930, just two years prior to the Norris-LaGuardia Act, and that Professor Frankfurter is generally recognized as the author of the Act itself.[4]

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Frankfurter and Greene had predicted that: "Effective recession in the present trend of prosperity is likely to invigorate the demand for legislation."[5] The disastrous depression which began in October, 1929, hit the nation before these prophetic words went to press. By the end of 1930 over six million people were unemployed and this number was doubled by 1932.[6] Whether rightly or wrongly capitalism lay discredited, and the Republican Party was held responsible for the depression. Conservatism no longer appealed to the millions who were unemployed nor to the small business men who were equally hard hit. The trend away from conservatism was indicated in the election of 1930 which gave control of Congress to the Democrats. That Congress was not slow in divining the will of the people is evident by the close margin by which conservative Charles Evans Hughes was appointed Chief Justice of the Supreme Court in 1930. Even Republican senators deplored this as a move to strengthen the conservative majority on the Supreme Court.[7] That same year the Senate rejected Judge Parker's nomination to the Supreme Court because of his anti-labor decision in the Red Jacket Case.[8] The time seemed propitious for effective anti-injunction legislation, and on March 23, 1932, the Norris-LaGuardia Act became law.

THE NORRIS-LAGUARDIA ACT[9]

The Norris-LaGuardia Act presaged a change in the government's attitude towards collective bargaining. When the United States was first

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[5] Frankfurter and Greene, op. cit., p. 150.

[6] Hicks, op. cit., p. 616.

[7] Ibid., p. 653.

[8] Supra, p 79 , footnote 46.

[9] 47 Stat. 70, 29 U. S. C. A. 101 et seq. (1932); reprinted infra,

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[7] Idem., p. 252.

[8] Idem., p.76 , footnote 46.

[9] 47 Stat. 70, 29 U. S. C. A. 101 et seq. (1932); reprinted infra.

instituted, combinations of workers to better their working conditions were frowned upon, and this attitude was reflected in the courts as is seen by the conspiracy cases. Later the attitude changed to one of toleration. Labor was free to bargain collectively provided that this did not conflict with the rights of employers or non-union employees. Labor failed in the courts under this policy of toleration because it was easy for an employer to prove that labor was encroaching upon his rights. In its essence toleration meant that the government gave recognition to the right of labor to bargain collectively, but the government would back the employer if the latter refused to grant this same recognition. The Norris-LaGuardia Act was a transition from the toleration to the encouragement of collective bargaining. The Act did not force the employer to bargain collectively, but it was a precursor for the National Labor Relations Act of 1935, which did make it obligatory for employers to bargain collectively with their employees. The Norris-LaGuardia Act removed the first obstacle in the path of collective bargaining by withdrawing support from the employers when they refused to bargain collectively. From then on employers were on their own as their legal weapon--the injunction--was restricted, and the economic struggle was equalized. To guide the courts in interpreting the Act according to this new philosophy, Section 2 recognizes that the individual employee is helpless in dealing with the employer and declares that it is the public policy of the United States that the worker "have full freedom of association, self-organization, and designation of representatives of his own choosing" and that he have the right to bargain collectively concerning

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Appendix I.

instituted, combinations of workers to better their working conditions were frowned upon, and this attitude was reflected in the courts as is seen by the conspiracy cases. Later the attitude changed to one of toleration. Labor was free to bargain collectively provided that this did not conflict with the rights of employers or non-union employees. Labor failed in the courts under this policy of toleration because it was easy for an employer to prove that labor was encroaching upon his rights. In its essence toleration meant that the government gave recognition to the right of labor to bargain collectively, but the government would back the employer if the latter refused to grant this same recognition. The Norris-LaGuardia Act was a transition from the toleration to the encouragement of collective bargaining. The Act did not force the employer to bargain collectively, but it was a precursor for the National Labor Relations Act of 1935, which did make it obligatory for employers to bargain collectively with their employees. The Norris-LaGuardia Act removed the first obstacle in the path of collective bargaining by withdrawing support from the employers when they refused to bargain collectively. From then on employers were on their own as their legal weapon--the injunction--was restricted, and the economic struggle was equalized. To guide the courts in interpreting the Act according to this new philosophy, Section 2 recognizes that the individual employee is helpless in dealing with the employer and declares that it is the public policy of the United States that the worker "have full freedom of association, self-organization, and designation of representatives of his own choosing" and that he have the right to bargain collectively concerning

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terms and conditions of employment; nor should he be interfered with in this right. If this seems to hit only indirectly at the anti-union or yellow-dog contract, Section 3 clearly states that such a contract is contrary to public policy and hence unenforceable in any court of the United States.

Section 4 lists acts which the federal courts may not enjoin:

a. Striking.

b. Joining or remaining a member of a union even though a yellow-dog contract has been signed.

c. Giving financial support to strikers, such as strike benefits.

d. Lawfully aiding any party to a labor dispute who is a litigant in the law courts.

e. Publicizing a labor dispute and all the facts in the dispute by any means short of fraud or violence.

f. Assembling peaceably to organize and promote a labor dispute.

g. Declaring the intention to do any of the above acts.

h. Agreeing with others to do any of the above acts.

i. Inducing others to do any of the above acts by any means short of fraud or violence and regardless of a yellow-dog contract.

This section again strikes at the yellow-dog contract by taking cognizance of the situations in which it might arise. Section 4 actually gives the union and others interested in a labor dispute a clear field in the economic conflict, provided they do not use fraud and violence. In analyzing the various acts which may not be enjoined, it will be helpful

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to recall all of the labor injunction cases discussed thus far, for it is in this area of experience that the reader will find the raison d'etre for every paragraph in Section 4. Congress was in effect repealing the abuses of the injunction not by speculating about how the injunction would be abused but by examining how it had been abused in the past. A single illustration will suffice. Section 4 (b) and (i) was a repeal of the Hitchman decision as the reader will readily recognize. This section is remarkable for the thoroughness with which it covers every legal facet that might be exposed in a labor dispute. At first glance, however, the question of a secondary boycott seems to be omitted, but this is not actually the case. Congress merely handled the situation sensibly. To have forbidden an injunction against secondary boycotts would have exposed the provision to unconstitutionality; Section 4 (e) would allow the union to conduct a secondary boycott by permitting it to publicize the facts in a labor dispute; sympathizers could take their cue from that.

Up to this point the Act is actually ineffective, for a court could still enjoin the acts covered if it found that a labor dispute did not exist. A union could be enjoined from striking a plant in which none of its members were employed. Something was needed, therefore, to widen the "allowable area of economic conflict" in keeping with the declaration of public policy in Section 2. This was accomplished in Section 13 (c), the most important part of the Act, which declared that: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." No longer could an injunction be secured by an employer because the members of the union were not his employees. Thus the Duplex decision was repealed, and the

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government gave recognition to the unity of interest that existed among organized labor. The minority opinion of Justice Brandeis had at last become the prevailing opinion!

Mindful of all possible ramafications, Congress forbids in Section 5 the issuance of an injunction based upon an unlawful combination or conspiracy on the part of those engaged in a labor dispute. Section 6 absolves the members of a union from all responsibility for the unauthorized and unlawful acts of individual members and officers. Section 7 stipulates when an injunction may be issued, but even this section restricts the use of injunctions and reforms injunctive procedure. Temporary restraining orders may be issued only after complainant alleges under oath that irreparable and substantial damage will ensue; in addition, the complainant shall file a bond with the court sufficient to recompense those enjoined for any injury they may suffer for an erroneous issuance of the injunction. Such a restraining order will be effective for no more than five days at which time a hearing must be held. In all other cases no injunction may be issued without a hearing with due notice to the parties and an opportunity for the cross-examination of witnesses. Notice must be given to <u>all</u> persons sought to be enjoined; this is directed against the issuance of blanket injunctions. Section 7 also restores the use of the injunction to the traditional sphere of equity jurisdiction from which it had strayed since its application in labor cases. The precepts of equity are reiterated--an injunction can issue only when substantial and irreparable injury is present and there is no adequate remedy at law nor police protection; an injunction may not issue unless "as to each item of relief" its denial will injure the complainant more

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than the union. It will be recalled that the courts had grown rather lax in this regard.

The Act further provides for trial by jury and by a new judge at the option of the accused in contempt cases provided the contempt is not committed in the presence of the Court. Appellate procedure shall be speedy. Thus cognizance is taken of the urgency of a rapid settlement in labor disputes.

The evils of a "drag-net" clause were not overlooked, and Section 9 provides that injunctions be issued only upon "findings of fact" and that only specific acts complained of shall be enjoined.

An unusual feature of the Act is the stipulation that the complainant shall "make every reasonable effort to settle" a dispute through mediation or voluntary arbitration before he be granted an injunction. Thus the employer is put on notice that he cannot take the easy way out in a labor dispute by the simple expediency of applying for an injunction. This was in keeping with the philosophy of the Act--the government was withdrawing the judicial weight which it had so long exercised on the side of the employer and was leaving the disputants strictly on their own. In the final analysis, the Norris-LaGuardia Act is important because it equalizes the legal strength of the disputants in a labor dispute. It did this not by entering the dispute on the side of labor but by removing those obstructions which had so long contained labor. The area of economic conflict was defined, and the government stood on the sidelines to ensure fair play. The significance of the change in the government's attitude can only be appreciated by taking a long backward glance at all theretofore labor legislation since the first

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session of Congress. Never had the objectives of labor organizations been given such keen consideration. By the Norris-LaGuardia Act labor gained the recognition for which it had been fighting for over one hundred years! And yet this Law was only a transition--a brief moment of government neutrality in labor disputes--for within the next few years the government came out openly on the side of labor by the passage of the Wagner Act of 1935.

CHAPTER XV

THE NORRIS-LAGUARDIA ACT IN THE COURTS

Despite the fact that Section 13 of the Norris-LaGuardia Act clearly indicates that a labor dispute exists regardless of whether or not the disputants are in the proximate relationship of employer and employees, some of the lower federal courts held otherwise in the earlier cases. In the United Electric Coal Co. Case[1], the Federal District Judge held that a controversy between an employer and a union was not a labor dispute within the meaning of the Act since none of the members of the union were employees of the United Electric Coal Company. In another case,[2] the International Ladies' Garment Workers Union picketed the Donnelly Garment Company to induce it to recognize the union as the exclusive bargaining agent for its employees. The Donnelly Company's employees belonged to an "independent" union which was recognized by the company, and there was no controversy between the company and its employees. The District Court held that no labor dispute existed since this was not a controversy concerning terms or conditions of employment. Finding the absence of a labor dispute in each case allowed the issuance of injunctions.

In the Cinderella Theatre Co. Case,[3] however, the Court refused to enjoin pickets who carried signs proclaiming that the plaintiff was

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[1] 80 F. (2d) 1 (1935).

[2] Donnelly Garment Co. v. International Ladies' Garment Workers Union, U. S. D. C., W. D., Mo., W. Div., No. 2924, August 13, 1937.

[3] Cinderella Theatre Co. v. Sign Writers' Local, 6 F. Supp. 164 (1934).

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[1] 90 F. (2d) 1 (1937).

[2] Donnelly Garment Co. v. International Ladies' Garment Workers Union, U. S. D. C., S. D., Mo., W. Div., No. 2764, August 12, 1937.

[3] Lindenville Theatre Co. v. Film Workers' Local, C. F. Supp. 161 (1941).

unfair to organized labor. Although none of the pickets were employees of the theatre, the District Court held that such action was not enjoinable under the Norris-LaGuardia Act and that a labor dispute existed within the meaning of the Act regardless of the absence of employer-employee relationship between the disputants.

The pitch for the interpretation of the Norris-LaGuardia Act was finally set in recent landmark cases which were decided by the Supreme Court. Among these was the Senn Case,[4] forerunner of the Lauf Case[5] which passed upon the constitutionality of the Act. Senn conducted a tile contracting business in Milwaukee, Wisconsin. He employed several journeymen and a few helpers, and he also worked with his men performing the same work as they. None of Senn's employees belonged to the union. The Tile Layers Union sought to induce Senn to become a union contractor, and this he agreed to do; but he refused to sign an agreement which would have prevented him from working with his hands in his own business because he was an employer. Senn even offered to join the union himself, but was refused because he could not meet the apprenticeship requirements. Senn thereupon refused to unionize his shop. The union began to picket peacefully and without violence. A request for an injunction by Senn was refused by the Supreme Court of Wisconsin. The court based its decision on a Wisconsin statute[6] (similar to the Norris-LaGuardia Act) which

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[4] Senn v. Title Layers Protective Union, Local No. 5, 301 U. S. 468 (1937); case reprinted in Handler, op. cit., pp. 144-150.

[5] Lauf v. E. G. Shinner & Co., 303 U. S. 323 (1938); reprinted ibid., pp. 150-154.

[6] Wisconsin Employment Peace Act of the Wisconsin Labor Code, sections 103.51 to 103.63 (Wis. Laws, 1931, C. 376; Laws, 1935, C. 551, 5).

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permitted peaceful picketing and publicizing of the facts in a labor dispute. The case was appealed to the Supreme Court of the United States, and before this body Senn argued that since the picketing was conducted in the absence of a strike, this was not a labor dispute. Furthermore, the right to work in his business with his own hands was guaranteed by the Fourteenth Amendment; and the Wisconsin statute, by allowing the union to picket Senn in order to induce him from exercising that right, contravened the Fourteenth Amendment. The Supreme Court rejected Senn's argument. It held that picketing and publicity do not violate the Fourteenth Amendment. That Senn's business suffered from the publicity did not deprive him of any right under the Constitution. Justice Brandeis, in writing the majority opinion, said: "It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution."[7] The Court held that the means authorized by the Wisconsin statute--peaceful picketing and publicizing the facts in a labor dispute--were not unlawful, and that the union kept within the bounds of the statue. Nor was the end sought by the union--inducing Senn to unionize his shop--unconstitutional. Justice Brandeis said, "The unions acted and had the right to act as they did, to protect the interests of their members against the harmful effect upon them of Senn's action."[8] That they picketed Senn though none of the union's members were employed by him was irrelevant. "Because his action was harmful, the fact that none of Senn's employees was a union member, or sought the union's aid, is immaterial."[9] Although the Norris-LaGuardia Act

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[7] Handler, op. cit., p. 116.

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was not involved in this case, this interpretation of a labor dispute foreshadowed the construction the Court was to put upon Section 13 of the Act.

A year later in 1938, the Court officially passed upon the constitutionality of the Norris-LaGuardia Act in Lauf v. E. G. Shinner & Co., and the principles laid down in the Senn Case were reaffirmed. In the Lauf Case, the employer operated a chain of meat markets in Milwaukee. None of his employees belonged to the union. The union made a demand upon the employer that he require his employees to join the union. The employer was perfectly willing to permit his employees to join the union, but his employees declined to do so. The union, thereupon, picketed the meat markets in order to induce the employer to force his employees to join the union. The employer applied for, and received, a temporary injunction from the Federal District Court. The decree restrained the picketing and the publication by the union that the employer was unfair to organized labor. The court held that since this was not a controversy between an employer and his employees, it was not a labor dispute as defined by the Wisconsin statute or the Norris-LaGuardia Act. This decision was affirmed by the Circuit Court of Appeals. The union took the case to the Supreme Court, and the Supreme Court reversed the decision. The Court held that the controversy in the case was a labor dispute as defined by the Norris-LaGuardia Act, and that the lower courts exceeded their authority by restraining picketing which was unaccompanied by fraud and violence.

The same year the Supreme Court rendered a similar decision in New Negro Alliance v. Sanitary Grocery Co.[10] The New Negro Alliance

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requested the Sanitary Grocery Company to employ Negroes in some of its stores that were located in the Negro section of Washington, D. C. The company ignored this request, and the Alliance placed in front of one of the stores a picket carrying the following sign:

Do Your Part!

Buy Where You Can Work!

No Negroes Employed Here![11]

The picket patrolled in a peaceful manner neither coercing nor intimidating any of the customers. The Sanitary Grocery Company was able to get an injunction from the District Court of the District of Columbia, which restrained the Alliance from picketing or boycotting the complainant's business and from doing any act which was injurious to the complainant's business. The Circuit Court of Appeals affirmed this decree, holding that this was not a labor dispute within the meaning of the Norris-LaGuardia Act because it did not concern terms or conditions of employment. The Supreme Court overruled this decision, and Justice Roberts, writing the majority opinion, displayed an acute insight into the actions of the New Negro Alliance and the intrinsic catenation between such conduct and terms or conditions of employment. His words bear repeating:

> [The] definitions [of the term "labor dispute"] plainly embrace the controversy which gave rise to the instant suit and classify it as one arising out of a dispute defined as a labor dispute. They leave no doubt that the New Negro Alliance and the

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> individual petitioners are in contemplation of the act, persons interested in the dispute. * * * The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation.[12]

The Court held that peaceful picketing and publicizing the facts in a labor dispute without fraud or violence were within the meaning of the Norris-LaGuardia Act, and that the lower court erred in not complying with the provisions of the Act.

In 1939 in Wilson & Co. v. Birl,[13] the Circuit Court of Appeals declined to enjoin secondary picketing[14] and secondary boycotting[15] because the union's conduct was unaccompanied by fraud and violence. Circuit Judge Biddle made direct reference to the secondary boycott in his opinion: "As found by the trial judge, the appellees' acts did not involve fraud or violence. Such pressure on others often loosely termed a 'secondary boycott', falls within the section [of the Norris-LaGuardia Act] and cannot be enjoined."[16] The case was not appealed to the Supreme Court.

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[12] Ibid., p. 156.

[13] 105 F. (2d) 948 (C. C. of App., Third Circuit, 1939); reprinted ibid., pp. 163-166.

[14] A general definition of a secondary boycott is the refusal of A to deal with B if B deals with C.

[15] Secondary picketing occurs when A, having a dispute with C, pickets B to induce him from dealing with C.

[16] Ibid., p. 166.

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The Hutcheson Case[17] of 1941, which involved criminal prosecution of the union by government under the Sherman Act, did not directly concern the Norris-LaGuardia Act. Nevertheless, Mr. Justice Frankfurter pointed out in his opinion that a secondary boycott unaccompanied by fraud or violence could not be enjoined under the terms of the Norris-LaGuardia Act.[18] The case involved a jurisdictional dispute[19] between the carpenters' union and the machinists' union over work to be done for Anheuser-Busch, Inc., at its plant in St. Louis, Missouri. In addition to ruling that the

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[17] United States v. Hutcheson, 312 U. S. 219 (1941); reprinted ibid., pp. 167-176.

[18] The circuitous route by which Mr. Justice Frankfurter arrived at this conclusion is aptly described by Gregory: "He observed that an indictment may be validly drawn under one statute and at the same time another statute, not referred to therein, 'may draw the sting of criminality from the allegations.' Thus, if an offense under the Sherman Act alone were found to have been absolved by the terms of Section 20 of the Clayton Act--the statute which was in some ways intended to amend and to modify the Sherman Act--then an indictment charging that offense could not stand up. He pointed out that a portion of Section 20 described certain conduct customarily engaged in by union people for the purposes of extending organization and of collective bargaining and made it specifically non-enjoinable. He also reasoned that this paragraph 'relieved such practices of all illegal taint by the catch-all provision, [nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.]' In short, if the actions of the four indicted union leaders in pursuing this secondary boycott amounted to conduct fairly described by this portion of the Clayton Act, then such conduct was not only not enjoinable but was not even illegal in any sense whatsoever. That is to say, it did not amount to a violation of any law of the United States, including the Sherman Act, under this concluding catch-all clause." Gregory, op. cit., pp. 269-270. The Supreme Court, however, had not so interpreted Section 20 of the Clayton Act in the Duplex decision in 1921. Gregory points out that Justice Frankfurter surmounted this obstacle "by deciding that Congress itself had in the Norris-LaGuardia Act redefined the conduct set forth in the second paragraph of Section 20 of the Clayton Act, with reference to employees and nonemployees alike. In this way, he declared, Congress had given this catch-all clause a new vitality." Ibid., p. 272.

[18] A jurisdictional dispute may be generally defined as ". . . a disagreement between unions over the right of one or the other to represent a particular group of employees, or over which union is to control certain work." S. T. Williamson and Herbert Harris, Trends in Collective Bargaining. (New York: The Twentieth Century Fund, 1945), p. 17.

secondary boycott conducted by the carpenters' union was permissible under the Norris-LaGuardia Act, the Supreme Court held that Section 13 of the Act permitted a jurisdictional dispute.

Thus in a series of landmark decisions, labor was emancipated from the grip of the labor injunction. Unlike the Clayton Act, the Norris-LaGuardia Act was interpreted by the Supreme Court as granting labor everything that labor had expected to receive when the Act was passed. To recapitulate briefly, the gains of organized labor under the Norris-LaGuardia Act were: the right to picket and publicize the facts in a labor dispute without fraud or violence, and in the absence of a strike regardless of whether or not the disputants were in direct relationship of employer and employees; the right to conduct secondary picketing and secondary boycotting unaccompanied by fraud or violence; the right to strike for a closed shop; and the right to engage in a jurisdictional dispute. In short, organized labor was able to employ its economic weapons unhampered by the injunction provided that it did not resort to fraud or violence.

CHAPTER XVI

THE STATUS OF THE INJUNCTION TODAY

The labor injunction was used less frequently after the passage of the Norris-LaGuardia Act and the interpretation of the Act by the Supreme Court. It is true that the employer could still apply for an injunction when fraud and violence were involved, but the employer's attorney would have to present strong evidence to that effect. No longer would the courts accept vague and general affidavits. Furthermore it was incumbent upon the employer to prove that he had made every reasonable effort to settle the dispute through mediation or voluntary abitration before he be granted an injunction. This opens the door to government interference, but the Act so restricted the injunction that this provision never recived a major test in the courts. For all practical purposes the labor injunction had ceased to be an efficacious employer's weapon.

The Norris-LaGuardia Act was only the first of a series of laws favorable to labor. With the election of Franklin D. Roosevelt to the presidency and with the inception of the "New Deal" a period of governmental encouragement to labor organizations was ushered in, and the Democratic Administration adopted a sympathetic policy towards the aims and aspirations of labor organizations. In 1933, Congress passed the National Industrial Recovery Act. Section 7 (a) of this Act provided that employees should have the right to organize and bargain collectively through representatives of their own choosing and that no employee be required to join a company union as a condition of employment. The purpose of the Act was to set codes of fair competition for certain industries, and Section 7 (a) was one of the conditions to the codes. The Act was declared unconstitional on May 27,

1935, by the Supreme Court in Schecter Poultry Co. v. U. S.[1] Although Section 7 (a) was not directly involved in the Schecter Case, it fell along with the rest of the Act since it was a part of the codes. A few months later, however, Congress passed the National Labor Relations Act which not only incorporated Section 7 (a) within its provisions, but it also prohibited certain actions of the employers which were deemed "Unfair Labor Practices"[2] Under the National Labor Relations Act, popularly known as the Wagner Act, a union no longer had to apply economic pressure on the employer to obtain recognition for collective bargaining purposes. The employer was required by law to do this, and the union's main task was to induce employees to become members of the union.

Under the benevolent approval of the New Deal, labor organizations expanded and grew powerful. Unfortunately, a few labor leaders became arrogant and abused their newly-won privileges. Meanwhile it was becoming obvious that the Wagner Act did not mitigate industrial strife as was expected in Section 1. The yearly number of strikes and lockouts, while fluctuating, was large and kept going up. In 1946, there were 116,000 man-days lost as the result of strikes as compared with 19,592 in 1934, the year before the Wagner Act.[3] Furthermore, employers complained that the Act did more than restore equality of bargaining power between employers and employees as was stated in Section 1--rather it gave more power to the employees. A reaction began to spread against the growing power of labor and the abuses of labor under existing legislation. Where labor had once cried

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[1] 295 U. S. 495 (1935).

[2] See Appendix II for list of unfair labor practices.

[3] Bureau of Labor Statistics. For an opposite view, cf. Leon H. Keyserling, Why the Wagner Act? Louis G. Silverberg, The Wagner Act: After Ten Years. Washington, D. C.: The Bureau of National Affairs, Inc., 1945.

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for reform, it was now the employer who demanded relief. A threatened railroad strike in 1946 and the perennial walkouts of the bituminous miners under John L. Lewis did not help the cause of labor. It was becoming clear that the country was in the mood for reform, and in 1946 when the control of Congress passed to the Republicans, they interpreted their victory, among other things, as a mandate from the people to inaugurate drastic reform of the labor legislation passed by the New Deal. Going through the same process of experiencial realization that had given birth to the Wagner Act, the Taft-Hartley Act of 1947 became law. The Republicans were able to pass the Act over President Truman's veto with the aid of their Democratic colleagues.

THE TAFT-HARTLEY ACT

It is beyond the scope of this thesis to enter into a detailed discussion of the Taft-Hartley Act. The Act is mentioned merely to complete the overall picture of the ebb and flow of labor legislation which has alternately favored capital and labor in the economic struggle. That part of the Act which deals with the labor injunction bears discussion.

Just as the Wagner Act prescribed certain conduct on the part of the employer as unfair, the Taft-Hartley Act enumerates certain actions by the union which would also be deemed unfair.[4] To prevent these unfair labor practices by the union, the National Labor Relations Board is empowered to issue "cease and desist orders." To enforce these orders, the Board may petition any circuit court for a temporary restraining order.

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In granting this temporary relief, the courts are not "limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932."[5] In other words, restraining orders can be issued, the Norris-LaGuardia Act notwithstanding! The adverse implications of this on labor may be far reaching. It is difficult to understand why Congress, in correcting the abuses of the Wagner Act, should have found it necessary to disturb the Norris-LaGuardia Act. This can only be another indication of the change that has taken place.

The Taft-Hartley Act further permits the Board to get a five-day temporary restraining order without notice in cases where substantial and irreparable damage to the employer may result.

Sections 206 to 210 of the Taft-Hartley Act deal with labor disputes which are defined as national emergencies. Whenever the President of the United States deems that a strike[6] "affecting an entire industry or a substantial part thereof" engaged in interstate commerce will "imperil the national health or safety," he may appoint a board of inquiry to investigate the issues. This board of inquiry shall submit a report to the President, and, at that time, he may direct the Attorney General to petition a federal district court to enjoin such a strike for a period of eighty days. In issuing the injunction, the court will not be limited in any way by the Norris-LaGuardia Act! After the Court order has been issued, the parties to the dispute are obligated to make every endeavor to settle

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[6] The same procedure is followed in case of a lockout.

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their differences with the aid of a "Federal Mediation and Conciliation Service" created under the Act. Neither side is obliged, however, to accept any of the proposals made by the Service. If no settlement is reached at the end of sixty days, the board of inquiry shall again report to the President. The current position of the parties and the employer's last offer will be made public. Within the succeeding fifteen days, the National Labor Relations Board shall take a secret poll of the employees to decide whether they wish to accept the employer's last offer. The results will be certified within five days thereafter. The eighty-day period having expired, the Attorney General shall petition the Court to discharge the injunction. This action may be taken sooner, of course, if settlement takes place at an earlier date. After the injunction has been discharged (andassuming that the dispute has not yet been settled), the President shall submit a full report to Congress "together with such recommendations as he may see fit to make for consideration and appropriate action."

This procedure is not actually as equitable as it seems, nor is it pregnant with the solution for settling a national emergency; for, in the final analysis, the President may have to settle a dispute by asking Congress to take "appropriate action." This means government interference, and both capital and labor should realize that government interference means political interference which can work to the detriment of both capital and labor. It is unfortunate that each side welcomes government interference when it is to its advantage, little caring that the advantage may be a temporary one, dependent upon the vicissitudes of politics.

The declaration of a national emergency by the President in the case of a strike places the burden upon labor of having created that

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The declaration of a national emergency by the President in the case of a strike places the burden upon labor of having created that

emergency. Sensational headlines and an uninformed public create an atmosphere which may not be conducive to a clear understanding of the issues. The fairness or unfairness of the demands may be overlooked. The apparent facts will stand out. It is labor who is striking or threatening to strike thus endangering the "national health or safety;" it is against labor that the injunction has been issued; it is up to labor to accept or reject the final offer of the employer. This places the pressure undeniably on labor. The public in its anxiety to prevent a fuel or food shortage may consider any last offer of the employer as a fair one which labor should accept. The psychological effect of the injunction and the hostile attitude of the public may lead the employees to accept the employer's last offer although it may not be a satisfactory one.

All this, of course, is only one of the possible outcomes in the event a national emergency is declared. There are labor leaders who have a penchant for creating national emergencies and for making unreasonable demands. This evil must be overcome, and a cooling off period is necessary to allow a proper sifting of the issues before a disastrous strike occurs. The question is whether such a cooling off period in a national emergency is to be secured by an injunction, especially when the injunction may be procured regardless of any provisions of the Norris-LaGuardia Act. Yet the Taft-Hartley Act stipulates several times that injunctions are not to be limited by the Norris-LaGuardia Act.

The Norris-LaGuardia Act is subject to abrogation not only in case of a national emergency but also where the union is guilty of unfair labor practices under the Act, and the Board decides to act against the union by asking for an injunction. To negate the Norris-LaGuardia Act in

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this manner may place labor in the position that it occupied prior to March 23, 1932. This thesis has endeavored to show the demoralizing stigma that was attached to the injunction, and the ease with which it was abused before the Norris-LaGuardia Act. The Taft-Hartley Act may make it possible for some of these abuses to reoccur, especially if the Act is administered by a Board and under an Administration which is not friendly to labor. In securing cooling off periods and in restraining unfair labor practices on the part of labor, the type of injunction defined by the Taft-Hartley Law could conceivably contain drag-net clauses and blanket clauses and be subject to the type of abuses discussed in Chapter XIII.

CONCLUSION

Although the Taft-Hartley Act, by providing for the abrogation of the Norris-LaGuardia Act in certain instances, appears to resuscitate the use of the injunction in labor disputes, actually the revival of the labor injunction on a large scale is merely hypothetical. It is unlikely at the moment that the labor injunction will assume its former importance in the American labor scene. For one thing, the raison d'etre for the indiscriminate issuance of labor injunctions no longer exists. Many of the actions that were enjoined prior to the Norris-LaGuardia Act no longer can be restrained because they have become the guaranteed rights of labor under the law. Even the Taft-Hartley Act continues to guarantee certain basic rights of labor. These include the right to organize for collective bargaining purposes, the right to strike, and the right to picket. The yellow-dog contract can no longer be enforced by the courts. The former wide area of injunctive action does not exist today. It will be recalled that most of the landmark cases discussed in this thesis involved the

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restraining of what are now the recognized rights of labor. It is true that certain actions by labor are now forbidden by the Taft-Hartley Act as unfair labor practices. These include sympathetic strikes, secondary boycotts, and jurisdictional disputes.[7] But even these restrictions may not be as drastic as they appear on the surface. While unions may not actively initiate a secondary boycott, the right to publicize the facts in a labor dispute still remains, and there is no law which prevents union sympathizers from voluntarily boycotting the products of the employer involved. The fact that labor may have to forego jurisdictional disputes may prove a boon to labor unions. The right to engage in such a dispute is of doubtful value, and may be detrimental to the unity of the labor movement.

Despite its apprehensions over the Taft-Hartley Act, labor may still enjoy its basic rights and remain free from injunctive action by working within the framework of the Act. This is not to say that the Act is perfect or to prognosticate how the Act will work out in practice. It is too early as yet to predict how the Taft-Hartley Law will affect employer-employee relations; there are many unforeseen factors which may play a role in the interpretation and application of the Act. Just as the purport of other labor legislation was extracted from the area of judicial experience, so too must the Taft-Hartley Act await interpretation until the Supreme Court rules upon it. One thing is evident as this time: Unless the Taft-Hartley Act completely breaks down or labor refuses to work within its framework, the labor injunction will play only a minor role in the American labor scene.

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Certainly the Taft-Hartley Act is not the last step in the search for a solution to the labor problem. Amendments to the Act are already being considered, and there will be other labor legislation passed. It has been seen that in the ebb and flow of federal labor legislation, the conduct of both capital and labor has been an important factor in instituting changes in the law. Whatever course future legislation may take depends in part upon labor leaders and employers. If the road leads to complete government control, they must share the responsibility. Both capital and labor have a vast accumulation of experience from which to derive a valuable lesson: Extreme measures and abuse of power and privilege will in the long run unleash violent reaction.

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The labor injunction was catapulted from the comparative obscurity of the state courts into national prominence in the Pullman Strike of 1894, which marked the beginning of the issuance of labor injunctions by federal courts. For the next thirty-eight years the activities of organized labor were greatly restricted by the labor injunction. During this period the labor injunction was the center of a bitter controversy which finally culminated in the passage of the Norris-LaGuardia Act of 1932, restricting the injunction to labor disputes involving fraud and violence.

It is the purpose of this study to seek out the raison d'etre for the Norris-LaGuardia Act by examining the area of experience from which the Act emerged and to ascertain the status of the labor injunction today. The study proceeds along four major lines: First, a brief examination of equity jurisprudence; second, an examination of the doctrines of conspiracy and of restraint of trade and their connection with the labor injunction; third, an analysis of federal legislation which has influenced the course of injunctive action; fourth, a study of the landmark decisions of the Supreme Court dealing with the labor injunction.

Equity jurisprudence is based upon remedial justice which began to develop in England as early as the time of William the Conqueror. In time certain precepts became the basis of equity jurisdiction. The more important of these principles are that suits in equity may be instituted where there is no adequate remedy at law and irreparable injury to property may ensue or is threatened. In such a situation a court of equity may

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Equity jurisprudence is based upon remedial justice which began to develop in England as early as the time of William the Conqueror. In time certain precepts became the basis of equity jurisdiction. The more important of these principles are that suits in equity may be instituted where there is no adequate remedy at law and irreparable injury to property may ensue or is threatened. In such a situation a court of equity may

issue an injunction which forbids acts which it considers contrary to equity and good conscience. The concept of property within this framework includes not only tangible property but also the right to do business.

It was not the injunction, however, that was originally used to protect "property" from the encroachments of labor but the doctrine of conspiracy which was applied as early as 1548 in England against combinations of workmen. In brief, the doctrine of conspiracy as it applied to labor condemned as criminal any combination of laborers to better their working conditions. This concept achieved its greatest prominence in American labor disputes during the early part of the nineteenth century. In the latter part of the nineteenth century, the doctrine of conspiracy was replaced by a more efficacious legal device--the injunction. In reality the doctrine of conspiracy was not discarded, for it formed the basis of the federal legislation under which injunctions could be issued against labor.

The injunction was first used against labor in England in 1868 in Springhead Spinning Co. v. Riley where the court restrained picketing and the display of signs by the defendants because it found such actions injurious to the property of the plaintiff. Property in this case was interpreted as the right to do business. The labor injunction, however, did not take root in England; it was in the United States that it attained its fullest development. After this early English case, the labor injunction began to be issued with increasing frequency by the state courts in America. In Sherry v. Perkins, a Massachusetts court restrained picketing by union workers in 1888. Two years later the passage of the Sherman Antitrust Act laid the basis for the issuance of injunctions in federal cases.

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The Sherman Act of 1890 was at first intended to render illegal business combinations in restraint of interstate commerce. In time the Supreme Court interpreted the Act as applying to combinations of labor as well as business, and one method of enforcing the Act was injunction proceedings instituted by the Government.

In 1894 the federal labor injunction was used with telling effect in the Pullman Strike when the principle was established that conduct by labor which endangered interstate commerce could be enjoined by a federal court. Eugene Debs and other labor leaders who refused to obey the injunction were found in contempt of court and sentenced to prison. In addition the injunction was issued not only against the parties to the dispute but also against "anyone whomsoever". This was the famous "omnibus" injunction which rendered anyone who disobyed its provisions liable to contempt proceedings.

Within the next two decades such economic weapons as strikes, picketing, and boycotts were enjoined when the courts found that they interfered with interstate commerce or that they caused irreparable damage to property (including the right to do business). Attempts to organize workers who had signed yellow-dog contracts promising not to join a union were also restrained. Unions found it difficult to organize interstate industries or to get employers to bargain collectively with them when the slightest economic pressure on their part could be countered with an injunction. Thus the agitation began for legislation excluding Labor from the provisions of the anti-trust laws and offering Labor relief from the injunction. The Clayton Act of 1914 contained some labor provisions which many thought to restrict the use of the labor injunction. The language of the Act proved to be ambiguous, however, for the Supreme Court ruled

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that the Act had not changed anything that had theretofore been considered law, and more injunctions were issued under the Clayton Act than ever before. The court's opinion and the Act in reality broadened the scope for injunctive action, for it permitted private parties to seek injunctions whereas this right had been reserved to the Government under the Sherman Act.

The 1920's witnessed the issuance of a series of labor injunctions which reaffirmed the employer's right to injunctive action. The Duplex Case established the principle that an injunction was not limited by Section 20 of the Clayton Act except in those labor disputes between an employer and his employees. An employer's business was deemed a property right which could be protected by the injunction under Section 20 of the Clayton Act. In the Bedford Cut Stone Case in 1927, the Supreme Court upheld an injunction restraining union labor from simple refusal to work on stone cut by non-union labor. In Truax v. Corrigan, the Supreme Court declared unconstitutional an Arizona statute which permitted peaceful picketing on the grounds that such a law denied equal protection of the laws as provided in the Fourteenth Amendment of the Constitution.

These decisions demonstrated that the Clayton Act had failed to provide adequate injunctive relief. Meanwhile it had become evident that the labor injunction was amenable to certain abuses, the more important of which were:

(a) The issuance of ex parte restraining orders without notice to the union or its members.

(b) An injunction thought wrongfully issued had to be obeyed.

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stereotyped complaints which bore no relations to the actual facts in the case, but were used merely because the wording had proved to be a successful formula in previous cases.

(d) Temporary and permanent injunctions were often issued solely on the basis of highly colored and conflicting affidavits without the opportunity to cross-examine witnesses in open court.

(e) Drag-net clauses in some injunctions prohibited any act whatsoever. Consequently, at times certain basic freedoms were enjoined.

(f) The issuance of omnibus or blanket injunctions which restrained all persons whomsoever. This prevented anyone from rendering any sort of aid to the persons enjoined, and forced persons who were not actual parties to the dispute to pay heed to the terms of the injunction.

(g) Contempt proceedings were held without a jury, and the same judge presided who had issued the injunction.

These abuses, in addition to the adverse decisions in the Supreme Court during the 1920's, intensified labor's efforts to secure injunctive reform. The American Federation of Labor was particularly active in this anti-injunction campaign, and it was aided by many legal experts who wished to see the inequities of the injunction abolished. The latter, foremost among whom was Professor Felix Frankfurter, presented sound legal arguments as to why a reform was needed in injunction procedure. In the early 1930's, the political and economic situation helped to create a suitable climate for anti-injunction legislation, and on March 23, 1932, Congress passed the Norris-LaGuardia Law.

Briefly, the Norris-LaGuardia Act corrected all of the abuses mentioned above, and it allowed labor to employ its economic weapons

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unhampered by the injunction, provided it did not resort to fraud or violence. Within the next decade the Supreme Court gave substance to the wording of the Norris-LaGuardia Act, and labor was at last emancipated from abusive injunctive action.

Meanwhile the Wagner Act of 1935 gave labor the right to organize for collective bargaining purposes, and many methods used theretofore by employers in combatting unions were declared unfair labor practices. This pro-labor legislation in the 1930's fostered the growth of labor unions both in size and power. The abuses of a few labor leaders, however, helped to kindle the reaction that was beginning to form against the growing power of labor. This plus the fact that the Wagner Act failed either to cut down industrial strife or to equalize bargaining power between employers and employees finally led to the passage of the Taft-Hartley Act in 1947.

Under the Labor-Managment Relations Act of 1947 certain actions by the unions are prescribed as unfair labor practices. Should the union commit these practices, the National Labor Relations Board may issue cease and desist orders. If this fails to have any effect on the conduct of the union, the Board may then apply to a federal court for an injunction against the union. Injunctive action may also be taken against a union in the case of a strike affecting an entire industry or a substantial part thereof. If the President deems that such a strike may imperil the national health or safety, he may direct the Attorney General to procure an eighty-day injunction. During this eighty-day period a board of inquiry will investigate the issues, the parties must make an attempt at conciliation, and the employees must be given an opportunity to vote upon the employer's last offer. Whatever the outcome, the injunction must be vacated at the

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expiration of the eighty-day period, and if the dispute is not settled at that time, the President may make recommendations to Congress to take appropriate action.

Theoretically, these provisions of the Taft-Hartley Act abrogate the Norris-LaGuardia Act to some extent, but actually it is inconceivable that the labor injunction will assume its former importance on the American labor scene. While certain defined unfair labor practices such as secondary boycotts and sympathetic and jurisdictional strikes are forbidden to unions, the basic rights of Labor are now protected by law and no longer come within the purview of injunctive action. These basic rights of Labor are protected from the encroachments of employers who are also restrained from committing certain defined unfair labor practices. By working within the framework of the Taft-Hartley Act, Labor may still employ its basic economic weapons and organize for collective bargaining purposes. Labor's adherence to the provisions of the Taft-Hartley Act will in part determine the course of future labor legislation in regard to the labor injunction.

APPENDIX

APPENDIX I

THE NORRIS-LAGUARDIA ACT

Act of March 23, 1932, c. 90, 47 Stat. 70 29 U.S.C.A. § 101 et seq.

Sec. 1. That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective

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bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

Sec. 3. Any undertaking of promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor or organization or of any employer organization.

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the

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Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are hereby defined) from doing, whether singly or in concert, any of the

following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Sec. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute

following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

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(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting any action or suit in any court of the United States or of any State;

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Sec. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute

constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

Sec. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect--

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be

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(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be

inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage cuased by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

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agreement entered into by the complainant and surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Sec. 8. No restraining order or injunctive relief such be granted to any complainant who has failed to comply with any obligations imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

Sec. 10. Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in

agreement entered into by the complainant and surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

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Sec. 10. Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in

ordinary cases the record of the case to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

Sec. 11. In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: Provided, That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

Sec. 12. The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

Sec. 13. When used in this Act, and for the purposes of this Act--

(a) A case shall be held to involve or to grow out of a labor dispute

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Sec. 13. When used in this Act, and for the purposes of this Act--

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when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United State whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or persons direct or indirect interests therein; or persons who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves persons who are members of a labor organization (as hereinafter defined) of persons participating or interested therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

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(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Sec. 14. If any provision of this Act or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

Sec. 15. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

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APPENDIX II

Sections 7 and 8 of the

NATIONAL LABOR RELATIONS ACT

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer--

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization, or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act

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as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

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APPENDIX III

Section 8 (b) of the

LABOR MANAGEMENT RELATIONS ACT, 1947

(The Taft-Hartley Act)

Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring

APPENDIX LIV

Section 2 (b) of the

LABOR MANAGEMENT RELATIONS ACT, 1947

(The Taft-Hartley Act)

Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring

any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the

any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (3) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, or after in an extent which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the

practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

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